

The role of ministerial discretionary powers in the granting of rights to minerals

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KEYWORDS

Mining – Discretion – Mineral and Petroleum Resources Development Act – Minister of Mineral Resources – Granting of prospecting and mining rights - Jurisdictional fact – Lawfulness – Reasonableness – Procedural fairness

ABSTRACT

In South Africa all mineral law matters are governed by the *Mineral and Petroleum Resources Development Act 28 of 2002* (hereafter MPRDA). The MPRDA was enacted to, *inter alia*, enforce equitable access to the nation's mineral and petroleum resources and advance the social and economic welfare of all South Africans. However, these objectives are undermined by the excessive ministerial discretion afforded to the Minister of Mineral Resources (hereafter the Minister) by the MPRDA, particularly during the process regulating the processing and granting of prospecting and mining rights. Section 9 is the most prominent example of a provision granting broad discretionary powers to the Minister. Section 9 makes provision for a "first in, first assessed" – system in order to regulate the order in which applications should be considered. However, the section does not make provision for all circumstances and entitles the Minister to exercise his discretion without providing adequate statutory guidance to the Minister. It is argued that the absence of statutory guidance does not necessarily render the provisions of section 9 unconstitutional as adequate guidance can be identified from the context in which the right was given. In exercising his discretion the onus is upon the Minister himself to ensure that he identifies and applies the necessary considerations so as to ensure that the exercise of his discretion adheres to the Constitutional requirements of lawfulness, reasonableness and procedural fairness.

ABSTRAK

In Suid-Afrika word alle mineraalreg sake gereguleer deur die *Mineral and Petroleum Resources Development Act 28 van 2002* (hierna MPRDA). Die MPRDA was gepromulgeer om, onder andere, gelyke toegang tot die land se mineral en petroleum hulpbronne aan te moedig. Hierdie doelwitte van die wet word wel ondermyn deur die oormatige ministeriële diskresie wat verleen word aan die Minister van Mineraalhulpbronne (hierna die Minister) deur die bepalings van die wet, veral die bepalings wat die volgorde waarin aansoeke oorweeg word reguleer. Artikel 9 is die mees prominente voorbeeld hiervan. Artikel 9 maak voorsiening vir 'n sisteem waarin aansoeke oorweeg word in die volgorde waarin die aansoeke ontvang is. Wat problematies is met betrekking tot die bepalings van artikel 9 is dat die artikel nie voorsiening maak vir alle omstandighede nie en dat die artikel die reg aan die Minister verleen om sy diskresie uit te oefen ten einde die mees gepaste applikant te kies sonder dat daar gepaste statutêre leiding bestaan oor die manier waarop sy diskresie uitgeoefen moet word. Daar word geargumenteer dat die afwesigheid van die nodige statutêre leiding nie noodwendig die bepalings van artikel 9 as ongrondwetlik bestempel nie, siende dat die nodige leiding wat die Minister moet oorweeg afgelei kan

word uit die konteks waarbinne die reg aan hom verskaf is. Wanneer die Minister sy diskresie uitoefen berus die onus op hom om te verseker that hy al die nodige oorwegings identifiseer en toepas ten einde te verseker dat sy diskresie-uitoefening voldoen aan die grondwetlike vereistes van regmatigheid, redelikheid en prosedurele billikheid.

1 Introduction

The South African mining industry plays a notable role within the country's economic development. In 2013 it was recognised that this industry contributed 8.3% to the Republic's gross domestic product (hereafter GDP) and that it promoted the development of employment opportunities within the country.¹ The mining industry also plays a significant role in the development of South African infrastructure. As an example one can refer to the industry's contribution to community development which amounted to R1,3 billion in 2011.² The industry also attracts a significant amount of foreign exchange.³ It accounts for one-third of the republic's exports and half of the country's foreign income.⁴

In South Africa, all regulatory mining law matters are governed by the *Mineral and Petroleum Resources Development Act* (hereafter MPRDA).⁵ As stated in this Act, the purpose informing its implementation is to provide equitable access to and the sustainable development of, the nation's mineral resources, and to regulate all matters associated herewith.⁶ Notwithstanding the MPRDA's laudable aims, it must be noted

¹ Chamber of Mines of South Africa *Facts and figures 2013/2014* 4.
Pedersen *Minerals and mining: A practical Global Guide* 219: "Mining accounts for almost one-fifth of South Africa's GDP and provides employment to some 500,000 workers directly and a further 500,00 people indirectly"; On the other hand it must be noted that, even though the Chamber of Mines is yet to release more recent statistics with regards to the mining industry's contribution towards the country's GDP, it is unlikely that such a contribution will compare favourably to the statistics recorded in 2013. In this regard reference can be made to <http://bit.ly/2dy9yiA>, where the author briefly outlines the industry's decline over the past year. As factors contributing to the industry's downfall over the past 12 months the author refers to numerous large-scale wage strikes conducted by mine workers for prolonged periods as well as frequent electricity blackouts that hampered efficient production.

² Kearney 2012 <http://bit.ly/2eb8KmA>, as seen in van der Schyff 2012 *New Contree* 131.

³ Van der Merwe and Ferreira 2013 *Without prejudice* 26.

⁴ Pedersen *Minerals and Mining: A Practical Global Guide* 219.

⁵ *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter MPRDA).

⁶ Long title MPRDA. The Preamble of the MPRDA contains two very important provisions when reference is made to the regulation of mineral resources within the Republic: Firstly, "Acknowledging that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof"; and secondly, "Emphasising the need to create an internationally competitive and efficient administrative and regulatory regime". The objects of the MPRDA, contained in section 2 of the Act, include the following ideals: "To recognize the internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the country; to give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources; to promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa; as well as to substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources."

that it is not without its shortcomings.⁷ One of these inadequacies relates to the presence of considerable amounts of ministerial discretion afforded to the Minister of Mineral Resources (hereafter the Minister).⁸ Some are of the opinion that the excessively broad discretion afforded to the Minister in terms of the Act might cripple foreign investment, which may have detrimental effects on the entire South African mining industry.⁹

Discretion essentially refers to an administrator's freedom of choice in deciding which legally valid option will be most suitable in deciding upon an administrative issue.¹⁰ Discretionary powers play an essential role in most legal jurisdictions throughout the world due to the fact that they alleviate the onus on legislative authorities to provide statutory solutions for all legal issues. The presence of such discretion is particularly necessary in instances where the issue to be decided upon is extremely complex or unique.¹¹ When assessing the validity of a discretionary power it must first be noted that the concept of discretion comprises two distinct parts, namely the formulation of discretionary provisions by the Legislature and the actual exercise of the discretion by the relevant individual.

With regards to the formulation of discretionary provisions it must be noted that over time the South African judiciary has identified specific criteria to which any provision affording a discretion must adhere, which said criteria will be discussed under paragraph 2. With regards to the exercise of a discretion it must be noted that in South Africa the exercise of ministerial discretion is subject to section 33 of the Constitution of the Republic of South Africa (hereafter the Constitution)¹² and the provisions of the *Promotion of Administrative Justice Act* (hereafter PAJA).¹³ Whereas section 33 of the Constitution demands that all administrative action be lawful, reasonable and procedurally fair, the provisions of PAJA serve to ensure that such action adheres to these three constitutional requirements. When assessing the role of Ministerial

⁷ Leon 2012 *Journal of Energy and Natural Resources Law* 9.

⁸ Leon 2012 *Journal of Energy and Natural Resources Law* 26.

⁹ Cornish 2012 *Inside mining* 8.

¹⁰ Burns *Administrative Law* 203; Baxter *Administrative Law* 80; Hoexter *Administrative Law in South Africa* 46; Davis *Discretionary Justice: A preliminary inquiry* 4.

¹¹ Beal 1986 *The Jurist* 72.

¹² Section 33 of the *Constitution of the Republic of South Africa*, 1996 (hereafter Constitution).

¹³ *Promotion of Administrative Justice Act* 3 of 2000.

discretion in regulating the granting of rights to minerals, the formulation of the relevant MPRDA provisions affording the discretion must be considered in great detail, as the sufficient formulation of the provision ultimately enables the official to adequately exercise his discretion.

In this regard it must be noted that various provisions contained within the MPRDA that regulate the granting of rights to minerals are laden with varied degrees of ministerial discretion. Sections 9, 17 and 23 are examples of such provisions. The exact nature of the discretion contained within these sections will be discussed further in Chapter 3. However, in order to contextualise the research question that underpins this study, it is necessary to briefly elude to the impact particularly of section 9. Section 9 of the MPRDA¹⁴ regulates the order in which applications for prospecting and mining rights are processed. The section states that if the minister receives more than one application for a prospecting right, mining right or mining permit with regards to the same mineral and piece of land on different days, the applications must be dealt with in order of receipt.¹⁵ This position is generally referred to as the “first in, first assessed” – system (hereafter FIFA system).¹⁶ However, section 9 determines further that in cases where applications are received on the same day it must be regarded as having been received at the same time and that, in the event where numerous applications are received on the same day, preference must be given to applications from historically disadvantaged individuals.¹⁷ Uncertainty reigns as to which applicant will enjoy preference if more than one historically disadvantaged individual were to apply on the same day, or if various applications were received on the same day but none from historically disadvantaged individuals, as the Act fails to address such a scenario.¹⁸ It seems as if the Minister would, in such circumstances, have to exercise his discretion in order to determine which application will be granted.

¹⁴ MPRDA; Even though section 104 of the MPRDA (which gives any community in who’s name a specific mineral and piece of land is registered a preferential right to prospect or mine on such land) also regulates the order of the processing of applications, the present discussion will not deal with the provisions of that section.

¹⁵ Section 9 MPRDA.

¹⁶ Mostert *Mineral Law: Principles and Policies in Perspective* 2012 91.

¹⁷ Section 9 MPRDA.

¹⁸ Mostert *Mineral Law: Principles and Policies in Perspective* 2012 91.

The proposed *Mineral and Petroleum Resources Amendment Bill* 15B of 2013 (hereafter MPRDA Amendment Bill)¹⁹ aims to alter the current position through the implementation of an invitation system. Section 5 of the MPRDA Amendment Bill effectively removes the FIFA system. The proposed invitation system entails that the Minister may invite applications for prospecting rights, mining rights and mining permits in respect of any area or land, by notice in the *Government Gazette*.²⁰ According to this section the Minister must prescribe a certain timeframe in which applications for the specific area may be lodged with the Regional Manager.²¹ However, the section fails to address the process to be followed if numerous applications are received and effectively affords the Minister a discretion in determining which applicant must receive the applicable right. In this regard it is rational to argue that the section not only fails to address the applicable procedure to be followed by the Minister in the event where numerous applications are received, but also fails to identify the necessary guidelines to assist the Minister in the event where he would in fact have to exercise his discretion in selecting the successful one amid various applications. Consequently, it would appear as if the Minister would possess broad discretionary powers when considering the applications.

The presence of this seemingly broad discretionary power brought about by the absence of the necessary statutory guidance particularly poses a threat to the ideal of legal certainty within the country's mineral regime.²² South Africa holds a considerable reserve of unexploited mineral resources.²³ However, due to the regulatory uncertainty brought about by the discretionary provisions found within the MPRDA, investors are reluctant to invest large capital in the unstable regulatory environment.²⁴ Peter Leon²⁵ states that the absence of legal certainty is a direct result, *inter alia*, of the presence of excessively broad discretion contained within the relevant legislation. He emphasises that investors require regulatory certainty and administrative efficiency when

¹⁹ *Mineral and Petroleum Resources Amendment Bill* 15B of 2013 (hereafter MPRDA Amendment Bill).

²⁰ Section 5 MPRDA Amendment Bill.

²¹ Section 5 MPRDA Amendment Bill.

²² See Doke 2014 <http://bit.ly/2dt3XJ0>.

²³ MiningMx 2010 <http://www.miningmx.com/news/markets/SA-richest-country-in-the-world.htm>.

²⁴ Cornish 2012 *Inside Mining* 8.

²⁵ Engelbrecht 2014 *Inside Mining* 15.

considering investments in aspiring, developing countries such as South Africa.²⁶ In an environment where effective administration and efficient regulation are essential, the absence of legal certainty within the mineral regime will most assuredly scare of potential investors.²⁷ Accordingly, it must be ensured that even the mere suspicion of excessively broad discretion does not aggravate an already tentative situation. Consequently, in order to assess whether or not such broad discretion is evident within our mineral law regime, the question has to be asked: what exactly is the role, nature and extent of ministerial discretionary powers expressly or implicitly provided for in the MPRDA, with specific reference to the processing and granting of prospecting and mining right applications.

In order to evaluate the abovementioned issue two crucial aspects must be considered. Firstly, a thorough examination of the role, nature and extent of ministerial discretion in South Africa's current constitutional dispensation must be conducted; and secondly, an assessment of the previous, current and proposed future mineral law regimes within South Africa must be conducted with specific emphasis on the presence of ministerial discretion in the granting of rights to minerals. Only after these aspects have been considered the role and impact of ministerial discretion in the granting of prospecting and mining rights in terms of the MPRDA can properly be assessed.

2 The legal nature of ministerial discretion and the principles applicable to the exercise thereof

2.1 Introduction

Discretion essentially refers to a decision-maker's power to select the most appropriate outcome when he is confronted with various legally valid options.²⁸ Discretionary powers have immense value within any regulatory system.²⁹ These powers are necessary to apply general principles to specific facts.³⁰ Discretion ensures that the

²⁶ Leon 2012 *Journal of Energy & Natural Resource Law* 13.

²⁷ Leon 2011 Mining <http://bit.ly/2dT5nxz>.

²⁸ *Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others* 2007 4 SA 395 (CC); Also see Davis KC *Discretionary Justice* (2nd edition) 1971 4 as seen in Hoexter *Administrative Law in South Africa* 46.

²⁹ Hoexter *Administrative Law in South Africa* 47.

³⁰ Baxter *Administrative law* 84; Also see *Dawood v Minister of Minister of Home Affairs* 2000 3 SA 936 (CC) par 5.

decision-maker has alternative avenues to consider when he is confronted with an unforeseeable situation, as it is impossible for the legislature to foresee every possibility when the relevant legislation is being drafted.³¹ Notwithstanding the immense value of discretionary powers, it should be noted that certain risks are associated with the use thereof. Many contend that the presence of codified rules or mechanical powers which restrict the avenues available to the decision-maker contributes to increased certainty and predictability and enforces synchronisation between the purpose of a particular decision and the means utilised to reach such a decision, while the presence of discretion may contribute to partiality, inconsistency, and unpredictability.³² However, it must be reiterated that modern legal systems acknowledge the need for discretion as a provision supplementary to legal rules.³³ In order to adequately consider the role of ministerial discretionary powers in the granting of rights to minerals within the South African mineral law framework, it is necessary to comprehensively discuss the nature of the said powers, as well as the principles of law applicable to the exercise thereof.

2.2 The nature of ministerial discretion in South Africa

The best manner to describe the concept of discretion is to see it as the ability to make a choice that cannot objectively be regarded as right or wrong.³⁴ Lord Diplock³⁵ stated that the concept of administrative discretion entails that the decision-maker has a choice between various options, where the possibility exists that individuals could hold differing opinions as to the preferable course of action in a given situation. This freedom of choice granted to the decision-maker when he is afforded a discretion is regulated by law and must be exercised within the confines of the empowering statute

³¹ Beal 1986 *The Jurist* 72; Baxter *Administrative law* 84.

³² Beal 1986 *The Jurist* 72; Hoexter *Administrative Law* 46; Also see Jowell *Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action* 13.

³³ Hoexter *Administrative Law* 47.

³⁴ Grey 1979 *Osgoode Hall Law Journal* 107. Also see footnote 1 and Dicey *An Introduction to the Study of Law of the Constitution* 423: In the context of the English government, Dicey classified the role of discretion as follows: "The discretionary powers of the government mean every kind of action which can legally be taken by the Crown, or by its servants, without the necessity for applying to Parliament for new statutory authority". This statement by Dicey has relevance to our understanding of the term administrative discretion, as it reiterates that discretion is a crucial tool in areas where our written law is inadequate.

³⁵ *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* 1977 (AC) 1014 at 1064.

that grants the said discretion.³⁶ Discretion can be either narrowly (guided) or broadly (unguided) formulated.³⁷

In the case of a narrow discretion the choices available to the decision-maker when he is confronted with a particular set of facts are narrowly outlined within the empowering statute.³⁸ In this instance the discretionary power of the official is severely constrained and he must ensure that he is aware of all the relevant statutory considerations prior to his exercising such discretion.³⁹ As an example, and with particular importance to the present discussion, one may refer to the power afforded to the Regional Manager in accepting or rejecting an application for a mining right in terms of the MPRDA.⁴⁰ As will be discussed in greater detail under paragraph 3, every applicant that applies for a mining right must comply with certain prerequisites. In this regard it must be noted that any individual or entity applying for a mining right must simultaneously apply for the necessary environmental authorisation and must lodge the application at the office of the Regional Manager in the prescribed form together with payment of the prescribed non-refundable application fee.⁴¹ Once the application is submitted by the applicant, the Regional Manager must then accept or reject the application.⁴² Section 22(2) of the MPRDA states that the Regional Manager must accept the application of an applicant if: the applicant has obtained the necessary environmental authorisation and has lodged the application at the office of the Regional Manager in the prescribed form together with payment of the prescribed non-refundable application fee; no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and no prior application for a prospecting right, mining right or mining permit or retention permit has been accepted for the same mineral and land and which remains to be granted or refused. The abovementioned provision is a clear example of a provision affording a narrow discretion to the decision-maker. The pre-requisites that any applicant has to comply with are narrowly defined within the empowering statute and the decision-

³⁶ Burns and Beukes *Administrative Law under the 1996 Constitution* 130.

³⁷ Wiechers *Administratiefreg* 249; Burns *Administrative Law* 390.

³⁸ Burns *Administrative Law* 390.

³⁹ Wiechers *Administratiefreg* 145.

⁴⁰ The power is afforded to the Regional Manager in terms of section 22 of the MPRDA.

⁴¹ Section 22(1) of the MPRDA.

⁴² Section 22(2) of the MPRDA.

maker must simply assess the application's compliance thereto. Thus, the subjective viewpoint of the decision-maker is of no importance whatsoever.

On the other hand, a broad discretion widens the ambit of the decision-maker's powers, as the exercise of the discretion is made subject to his independent assessment of the situation.⁴³ However, it must be noted that no discretion is boundless, and even a broad discretion must be exercised within the boundaries set out by the law.⁴⁴ In essence this entails that all exercise of discretionary powers must conform to the provisions of the Constitution as well as all other applicable laws.⁴⁵ In determining whether a particular discretion afforded to a decision-maker can be regarded as narrow or broad, one has to consider the formulation of the provision affording the discretion, seeing as the guidance provided by the provision ultimately determines whether such discretion can be regarded as narrow or broad. At this stage one thus has to distinguish between the two different aspects of a discretionary power, namely: the formulation of discretionary provisions by the legislature, and the actual exercise of the discretion by an administrator in terms of the applicable legislation.

2.3 The legislative formulation of discretion

When assessing the constitutional validity of legislative provisions affording discretionary powers, reference can be made to various cases where the courts have embarked on detailed discussions as to what guidance the provision affording the discretion should give to the decision-maker. In order to illustrate this point certain cases will now be considered in greater detail. In this regard one may firstly refer to the findings in *Dawood v Minister of Home Affairs* (hereafter *Dawood case*).⁴⁶

In the *Dawood case* the Constitutional Court declared section 25(9)(b) (read with sections 26(3) and (6)) of the *Aliens Control Act*⁴⁷ to be invalid due to its inconsistency

⁴³ Burns *Administrative Law* 390; As will be argued below in chapter 3, it is strongly contended that the provisions of section 9 of the MPRDA, together with the proposed amendments thereto, constitute broad discretionary provisions.

⁴⁴ Burns and Beukes *Administrative Law under the 1996 Constitution* 192.

⁴⁵ Burns *Administrative law* 390.

⁴⁶ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).

⁴⁷ Section 25(9)(a)-(b) of the *Aliens Control Act* 96 of 1991 (hereafter *Aliens Control Act*): "(a) A regional committee may, on an application mentioned in subsection (1) made by an alien who has been permitted under this Act to temporarily sojourn in the Republic in terms of a permit referred

with the Constitution. The matter related to the statutory provisions governing the granting and extension of temporary residence permits (in terms of sections 26(3) and 26(6)), as well as the provisions governing the granting of immigration permits (in terms of section 25(9)(b)). As the court thoroughly explained, section 25(9)(b) (read with sections 26(3) and (6)), afforded a limited privilege to spouses and dependent children of people lawfully and permanently resident in South Africa to remain in the country while their applications for immigration permits were being considered, as long as they were in possession of a valid temporary residence permit.⁴⁸ However, this privilege was dependent upon the exercise of the discretion conferred upon officials by sections 26(3) and 26(6). These subsections left the granting or refusal of temporary residence permits to the discretion of the relevant official without identifying any guidelines as to what factors are to be assessed in considering the application.⁴⁹ Section 26(3) merely referred to “all the relevant requirements of this Act...” when reference was made to the possible factors to be considered. In this light, the court found that not only was the provision void of guidance but the reference to “all the relevant requirements of this Act...” could not be reasonably capable of a meaning that identified the relevant factors to be considered by the official in deciding whether or not a temporary residence permit should be granted to an applicant.⁵⁰ It was held that the legal expertise of administrative officials, or the lack thereof, limits their abilities to identify the necessary factors.⁵¹

In the *Dawood case* it was reaffirmed that the exercise of a discretion fulfils a key role within any legal regime and that it enables decision-makers to utilise abstract rules in

to in section 26(1)(b) (i.e a ‘work permit’), authorise the issue to him or her of a permit in terms of this section *mutatis mutandis* as if he or she were outside the Republic, and upon the issue of that permit he or she may reside permanently in the Republic. (b) Notwithstanding the provisions of paragraph (a), a regional committee may authorise a permit in terms of this section to any person who has been permitted under section 26(1) to temporarily sojourn in the Republic, if such person is a person referred to in subsection (4)(b) or (5)”. In *the Dawood case* 999(B) the court gave a clear explanation as to what exactly section 25(9)(a)-(b) entails: “... the necessary implication of s 25(9)(a) of the Act was that, as a general rule, a regional committee of the Board could only authorise the issue of an immigration permit if the applicant concerned was outside the Republic at the time of such authorisation. Section 25(9)(b) exempted certain categories of persons (the destitute, aged or infirm members of the family of a person permanently and lawfully resident within the Republic) from the general rule established by s 25(9)(a).”

⁴⁸ *Dawood case* par 52 at 968G.

⁴⁹ *Dawood case* par 52 at 968H.

⁵⁰ *Dawood case* par 45 at 966A.

⁵¹ *Dawood case* par 46 at 966C-966D.

specific circumstances.⁵² The court conducted a detailed analysis of the manner in which the legislature drafts discretionary provisions.⁵³ It was reiterated that the legislature has a clear and concise obligation to ensure that legislation is drafted in such a manner as to limit the risk of an unconstitutional exercise of discretionary powers and that a failure to identify the relevant criteria that must be considered when exercising a discretionary power, introduces an element of arbitrariness that is inconsistent with constitutional values.⁵⁴ The court ultimately concluded that section 25(9)(b) read with section 26(3) and (6) of the *Aliens Control Act* is inconsistent with the Constitution due to the absence of legislative guidance identifying the circumstances in which a refusal to grant or extend a temporary permit would be justifiable.⁵⁵

Another matter of particular importance with regards to the formulation of discretion is the case of *Janse van Rensburg v Minister of Trade and Industry* (hereafter *Janse van Rensburg case*).⁵⁶ In this matter the Transvaal Provincial Division of the High Court, *inter alia*, declared section 8(5)(a) of the *Harmful Business Practices Act*⁵⁷ unconstitutional due to the fact that this section conferred excessively broad discretionary powers upon the relevant Minister. Section 8(5)(a)⁵⁸ made provision for

⁵² *Dawood case* par 53 at 969A.

⁵³ *Dawood case* par 41 at 964G.

⁵⁴ *Dawood case* par 58 at 970I.

Also see De Villiers 2006 *SAJHR* 423 where the author reiterated that: "the policy guidelines required by the Dawood judgement should contain the detail necessary to serve their purpose".

⁵⁵ *Dawood case* par 61 at 972A-C.

⁵⁶ *Janse van Rensburg v Minister of Trade and Industry* 2000 11 BCLR 1235 (CC) (hereafter *Janse van Rensburg case*).

⁵⁷ *Harmful Business Practices Act* 71 of 1988 (hereafter Harmful Business Practices Act).

⁵⁸ Section 8(5)(a) of the *Harmful Business Practices Act* 71 of 1988: "After such a notice relating to an investigation in terms of ss (1)(a) has been published and before the relevant report is submitted to him the Minister may, on the recommendation of the committee -

- (i) prescribe by notice in the *Gazette*, for a period specified in the notice, but not exceeding the period of six months referred to in ss (3), such action as in the opinion of the Minister shall be taken to stay or prevent any unfair business practice which is the subject of the investigation and which the Minister has reason to believe exists or may come into existence;
- (ii) by notice in writing or by notice in the *Gazette* -
 - (aa) attach any money or other property whether movable or immovable which is related to such investigation and which is held by any person on account or on behalf of or for the benefit of a person mentioned in the notice, or of a customer, debtor or creditor of the person mentioned in the notice, until a curator referred to in s 12(2) takes that money or other property into his possession;

the Minister of Trade and Industry, on the recommendation of the committee, to take such action as he may deem necessary to stay or prevent any unfair business practice which is the subject of an investigation and which the Minister has reason to believe exists. The learned judge held that section 8(5)(a) is a drastic and absolutely discretionary provision that empowers the Minister to act on untested allegations and a preliminary opinion.⁵⁹

Subsequent to the applicable sections being ruled as invalid, the matter was heard on appeal by the Constitutional Court (hereafter CC). In the CC a brief explanation as to the formulation of discretionary powers was given. As was done in the Dawood case, the court held that the legislature has a responsibility to promote, protect and fulfil all fundamental rights contained within the Constitution.⁶⁰ The court once again emphasised the need for the provision of guidance in cases where a discretion has been granted to an official during the exercise of his administrative duties.⁶¹ In the present case no such guidance was provided to the official in the exercise of his duties.⁶² On that basis the court found that the provisions of section 8(5)(a) of the *Harmful Business Practices Act* were unfair and a violation of the protection afforded by section 33(1).⁶³ However, the court suspended the functioning of the order of invalidity for 12 months in order to grant the Legislature time to rectify the defects.⁶⁴

The last case of particular importance is the matter of *Affordable Medicines Trust and Others v Minister of Health and Others* (hereafter *Affordable Medicines Case*).⁶⁵ This matter related to an application for leave to appeal directly to the Constitutional Court against an order handed down by the Pretoria High Court in which the said court dismissed a constitutional challenge. The challenge was brought as a result of a licensing scheme implemented by the government. In terms of this scheme no

(bb) prohibit a person mentioned in the notice from withdrawing or otherwise dealing with any money or movable or immovable property mentioned in the notice."

⁵⁹ *Janse van Rensburg case* par 17 at 1243

⁶⁰ *Janse van Rensburg case* par 25 at 42.

⁶¹ *Janse van Rensburg case* par 25 at 42.

⁶² *Janse van Rensburg case* par 25 at 42.

⁶³ *Janse van Resnburg case* par 25 at 42.

⁶⁴ *Janse van Rensburg case* par 36 at 45

⁶⁵ *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) (hereafter *Affordable Medicines case*).

individual was permitted to dispense medicine unless the said person had been granted a licence to that effect by the Director-General of the Department of Health.⁶⁶ The challenge related *inter alia* to the Director-General's power to prescribe conditions that the dispensing licence could be made subject to in terms of section 22C(1)(a).⁶⁷ The applicants contended that the inclusion of the phrase "on the prescribed conditions", as is contained in section 22C(1)(a) of the *Medicines and Related Substances Act*⁶⁸ was overbroad and vague, as the provision afforded excessively "wide, unlimited and uncircumscribed arbitrary legislative powers" and that it failed to disclose the considerations relevant to the exercise of the Director-General's power.⁶⁹ The applicants contended that the Legislature should rather have narrowly defined the prescribed conditions that the Director-General might impose.⁷⁰

In his findings the learned Ngcobo J confirmed that the Constitution does not prohibit Parliament from delegating subordinate regulatory authority.⁷¹ He did, however, confirm that the delegation must not be so broad as to cause uncertainty as to exactly what the powers of the administrator are.⁷² Section 22C(1)(a) leaves it to the Director-General to determine what the relevant prescribed conditions are that a dispensing license could be made subject to. Ultimately the court concluded that the provision granting the discretionary power cannot be deemed as excessively broad. The court was of the opinion that the power afforded to the Director-General was adequately constrained by the context in which the right was given.⁷³ In this regard the court made reference to considerations such as government policy, access to medicines that

⁶⁶ *Affordable Medicines case* par 1 at 258D.

⁶⁷ Section 22C(1)(a) of the *Medicines and Related Substances Act* 101 of 1965 (hereafter Medicines Act): "Subject to the provisions of this section the Director-General may on application in the prescribed manner and on payment of the prescribed fee issue to a medical practitioner, dentist, practitioner, nurse or other person registered under the Health Professions Act, 1974, a license to compound and dispense medicines, on the prescribed conditions."

⁶⁸ *Medicines and Related Substances Act* 101 of 1965.

⁶⁹ *Affordable Medicines case* par 31 at 266; Also see *Noyo v The Minister of Agriculture and Land Affairs* 2007 JDR 0961 (Tk), par 97 at 38. It was held that the scope of any discretion must be accurately defined and that the legislator must identify specific criteria to be considered by the administrator exercising the said discretion.

⁷⁰ *Affordable Medicines case* par 31 at 266.

⁷¹ *Affordable Medicines case* par 32 at 266F.

⁷² *Affordable Medicines case* par 34 at 267D.

⁷³ *Affordable Medicines case* par 38 at 268.

are safe for consumption, the purpose for which the discretion was given, etcetera, that must have been considered by the official in exercising his power.⁷⁴

With regards to the formulation of discretionary provisions it must be noted that the abovementioned cases placed emphasis on the fact that when discretionary provisions are drafted the legislature must ensure that such provisions are accompanied by adequate statutory guidance. It was mentioned that the absence of adequate statutory guidance might lead to the arbitrary exercise of the relevant power.⁷⁵ The *Affordable Medicines case* is of particular importance with regards to the provision of guidance, as in this matter Ngcobo J extended the parameters of where statutory guidance would ordinarily be found. He emphasised that even though no explicit guidance was present within the relevant empowering provision, one has to consider possible guidance within the context of the surrounding circumstances. The duty to consider the guidance evident within the surrounding context ultimately falls upon the administrator exercising the discretion. Accordingly, in order to determine exactly how the administrator must exercise such discretion, a detailed explanation of the exercise of administrative discretion will now follow.

2.4 The exercise of administrative discretion

Apart from the formulation of provisions conferring discretion by the Legislature one also has to assess the principles of law applicable to the actual exercise of the said discretion by the relevant decision-maker. In this regard it must be understood that a single statutory power may necessitate the exercise of a discretion in various different phases of the decision-making process. These phases may, amongst others, include: discretion exercised in assessing compliance with jurisdictional facts; discretion exercised in relation to guiding factors; as well as the discretion to ultimately choose the appropriate outcome. It is also of paramount importance to discuss the administrative principles (or requirements) applicable to the exercise of the discretion, as is contained in section 33 of the Constitution and section 6 of the MPRDA, in order to gain clarity as to what is expected from the relevant decision-maker in the various

⁷⁴ *Affordable Medicines case* par 38 at 268D-E.

⁷⁵ *Dawood case* par 58 at 970I; Also see *Janse van Rensburg case* par 25 at 42.

phases of the decision-making process. In commencing this discussion one may first refer to the phases of the decision-making process. Prior to commencing the discussion it must be noted that the division within the various phases of the decision-making process has been newly formulated with due regard to the information available relating to the exercise of discretionary power. The division aims to provide clarity with regards to the exercise of these powers.

2.4.1 Phases of the decision-making process

2.4.1.1 Discretion exercised in assessing compliance with jurisdictional facts

An empowering statute sometimes regulates administrative discretion by specifying pre-requisites known as jurisdictional facts to be complied with.⁷⁶ In essence the term 'jurisdictional fact' refers to the statutory prerequisites that have to be complied with prior to the relevant official being entitled to exercise his discretion.⁷⁷ Various authors divide jurisdictional facts into two separate types of pre-conditions, namely substantive jurisdictional facts and procedural jurisdictional facts.⁷⁸ Substantive jurisdictional facts are the prescribed conditions of law or fact to be met whereas procedural jurisdictional facts are the procedural requirements that must be complied with by the decision-maker when exercising his discretion.⁷⁹ The case that best explains the value of jurisdictional facts within our legal system is the matter of *South African Defence and Aid Fund v Minister of Justice* (hereafter *Aid Fund case*).⁸⁰

The *Aid Fund case* related to the then State President's decision to declare a particular organisation invalid due to the fact that the organisation *inter alia*:

⁷⁶ Hoexter *Administrative Law in South Africa* 290.

⁷⁷ Burns and Beukes *Administrative Law under the 1996 Constitution* 492; Burns *Administrative Law* 391; Hoexter *Administrative Law in South Africa* 290.

⁷⁸ Hoexter *Administrative Law in South Africa* 290; Baxter *Administrative Law* 457-459; Burns *Administrative law* 391-393.

⁷⁹ *South African Defence and Aid Fund and another v Minister of Justice* 1967 1 SA 31 C page 34H; Burns *Administrative Law* 324; Hoexter *Administrative Law in South Africa* 296; Baxter *Administrative Law* 461.

⁸⁰ *South African Defence and Aid Fund and another v Minister of Justice* 1967 1 SA 31 (C) (hereafter *Aid Fund case*); The *Aid Fund case* was heard in 1966 by the Cape Provincial Division. Even though the case may be a bit timeworn, the court's description of what exactly constitutes jurisdictional facts is still of tremendous value to our current legal regime; so much so that in 2010 Ebersohn AJ reiterated that the *Aid Fund case* is still seen as the leading precedent with regards to jurisdictional facts.

professed by its name to be an organisation for propagating the principles or promoting the spread of Communism; being an organisation whose purpose was to propagate the principles of Communism; or to further the achievement of any of the objects of Communism.

The plaintiffs instituted action against the Minister of Justice requesting that the court declare the decision invalid due to the fact that the decision was based upon wrong facts. In its ruling the court held that the State President's decision cannot be declared invalid merely based upon the fact that, in making his decision, he relied upon incorrect facts. It was held further that the declaration could be regarded as invalid only if it were based upon *mala fides*, an allegation of ulterior motive, or due to the State President's failure to adequately apply his mind to the matter.⁸¹

In the *Aid Fund* case the court embarked on a detailed discussion of the term "jurisdictional fact". The court held that a fact is regarded as a jurisdictional fact when the legislature identifies the existence of the fact as a pre-requisite to the exercise of the relevant statutory power.⁸² In other words, this situation would entail that, in the event where the relevant jurisdictional fact is not present, the statutory power may not be exercised, and any subsequent exercise of the power would be regarded as invalid.⁸³ The court further emphasised that a substantive jurisdictional fact may be divided into two broad categories of application. The first category is better known as objective jurisdictional facts. This category refers to jurisdictional facts that must have objectively existed prior to the exercise of the statutory power.⁸⁴ The second category of jurisdictional fact is known as subjectively phrased jurisdictional facts. In this instance the legislature affords the relevant decision-maker the right to determine whether the jurisdictional fact existed prior to the exercise of the statutory power.⁸⁵ In

⁸¹ Also see Baxter *Administrative Law* 460-461: "Hence, where a public authority enjoys a discretionary power of choice concerning the existence and significance of the factual preconditions for the general exercise of its powers, the only fact that remains 'jurisdictional' is whether the public authority has made the choice. The implication is that the 'choice' itself – how it is made and whether it is rational- is unreviewable"; It must be noted that the above is no longer the legal position due to the implementation of PAJA.

⁸² *Aid Fund* case par 34F.

Also see *Eye of Africa Developments (Pty) Ltd v Shear* 2012 2 All SA par 32 where the court held that the necessary pre-conditions must exist before a power can be exercised.

⁸³ *Aid Fund* case par 34H.

⁸⁴ *Aid Fund* case par 34H.

⁸⁵ *Aid Fund* case par 35A; As will be discussed in paragraph 3.3.2.2 at 62, the provisions of section 9 of

other words, whereas in the first category the fact had to be objectively present, the second category concerns itself only with whether the relevant administrator, subjectively speaking, deemed the fact to be present.⁸⁶ In this regard it must be noted that the question whether or not an official's subjective opinion is justiciable by law, has been a topic of great debate during the recent history of the RSA's legal system.⁸⁷

In order to demonstrate the position with regards to the reviewability of an official's subjective opinion, the relevant principles of common law, and the provisions of the Constitution as well as the provisions of PAJA will now each be discussed in isolation. In this regard it seems fitting to commence with a discussion of the relevant common law principles. When discussing the status of subjectively assessed jurisdictional facts at common law reference can be made to various cases where the courts have debated the reviewability of decisions based upon the decision-maker's subjective opinion.⁸⁸ In this regard one may commence the discussion by once again referring to the court's findings in the Aid Fund case. This matter was heard by the Cape Provincial Division in 1966.⁸⁹ Here it was held that a decision-maker's assessment of whether a jurisdictional fact's presence has been established was not reviewable by a court and that the judiciary may only interfere with the administrator's decision in the event where it can be proven that he acted *mala fide*, for an ulterior motive, or failed to adequately apply his mind to the matter.⁹⁰ In his book published in 1984, Baxter reinforced the court's stance in the Aid Fund matter. In fact, he went further by arguing that the distinction between subjective and objective jurisdictional facts is

⁸⁶ See Baxter *Administrative Law* 460-461: "Hence, where a public authority enjoys a discretionary power of choice concerning the existence and significance of the factual preconditions for the general exercise of its powers, the only fact that remains 'jurisdictional' is whether the public authority has made the choice."

⁸⁷ See *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 1 SA 1 (CC) par 93 at 50.

⁸⁸ See *Media Workers Association of South Africa v Press Corporation of South Africa Ltd ('Perskor')* 1992 4 SA 791 (A); *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 1 SA 1 (CC). *Minister of Law and Order and Others v Hurley and Another* 1986 3 SA; *Walele v City of Cape Town* 2008 6 SA 129 (CC).

⁸⁹ *Aid Fund case*.

⁹⁰ *Aid Fund case* par 35G; Also see *Media Workers Association of South Africa v Press Corporation of South Africa Ltd ('Perskor')* 1992 4 SA 791 (A) at 800D – 800F where the court held that: "The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him."

unnecessary, as any provision that contains a discretionary element cannot be regarded as a jurisdictional fact and can therefore not be reviewed by the judiciary.⁹¹

The cautious approach adopted by the courts with regards to the reviewability of decisions made on account of the subjective discretion of a decision-maker started to shift in 1986 due to the judgement in the matter of *Minister of Law and Order v Hurley* (hereafter *Hurley case*).⁹² The most prominent issue that was to be decided in the Hurley case was whether the court could review the decision made by a police official to arrest an individual in terms of section 29(1) (read with section 29(6)) of the *Internal Security Act*.⁹³ Section 29(1)⁹⁴ empowered a commissioned police officer to arrest a person without a warrant if the official has reason to believe that the person has committed or intended to commit a crime or was withholding specific information from the South African Police. In this matter the Appellate Division was called upon to decide whether the *court a quo's* decision to render the official's decision justiciable was correct.

In the Hurley case the appellants argued that the intention of the legislature in drafting section 29 was to confer sole discretion on the commissioned official himself.⁹⁵ The Appellate Division did not concur with this argument. The court held that the words "if he has reason to believe" implied that the official's decision had to be based upon objective grounds, and that, as a result, the court was entitled to assess whether such

⁹¹ Baxter *Administrative Law* 461.

⁹² *Minister of Law and Order and Others v Hurley and Another* 1986 3 SA par 568 (hereafter *Hurley case*).

⁹³ *Internal Security Act* 74 of 1982 (Hereafter Internal Security Act);

⁹⁴ The relevant parts of section 29(1) of the Internal Security Act provided that: "Notwithstanding anything to the contrary in any law or the common law contained..., any commissioned officer as defined in section 1 of the Police Act 7 of 1958 of or above the rank of lieutenant-colonel may, if he has reason to believe that any person who happens to be at any place in the Republic:

(a) has committed or intends or intended to commit an offence referred to in section 54(1), (2) or (4),...; or

(b) is withholding from the South African Police any information relating to the commission of an offence referred to in para (a)...

without warrant arrest such person or cause him to be arrested and detained for interrogation in accordance with such directions as the Commissioner may, subject to the directions of the Minister, from time to time issue,..." Section 29(6) of the *Internal Security Act* 74 of 1982 stated that: "No court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section."

⁹⁵ *Hurley case* at 577G.

grounds reasonably existed.⁹⁶ In other words, the court was of the opinion that the words “if he has reason to believe...” in section 29(1) should be read as construing an objective criterion against which the official’s actions must be evaluated. The appeal was thus dismissed with costs.

In our current constitutional dispensation the courts have essentially confirmed the position as held in the Hurley case. In this regard reference can be made to the matter of *Walele v City of Cape Town* (hereafter *Walele case*).⁹⁷ Here the Constitutional Court reiterated that:

In the past, when reasonableness was not taken as a self-standing ground for review, the City’s *ipse dixit* could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker’s opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds.⁹⁸

One may state that the court’s recent shift towards a revitalised willingness to review decisions based upon the decision-maker’s subjective opinion has been codified within section 33 of the Constitution as well as in the provisions of PAJA. The contents of section 33 of the Constitution will be comprehensively discussed in 2.4.2. With regards to PAJA, reference must be made to section 6(2)(b) of the Act which states that:

A court or tribunal has the power to judicially review an administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.⁹⁹

Hoexter¹⁰⁰ notes that, even though the provisions of section 6(2)(b) do not contain the usual jurisdictional fact terminology, she is of the opinion that the section provides

⁹⁶ *Hurley case* at 578B.

⁹⁷ *Walele v City of Cape Town* 2008 6 SA 129 (CC) (hereafter *Walele case*).

⁹⁸ *Walele case* par 160A-160B; Also see *Camps Bay Ratepayers and Residents Association v Minister of Planning, Culture and Administration, Western Cape* 2001 4 SA 294 (C) par 321B.

⁹⁹ Section 6(2)(b) of PAJA; Also see *Watson v Commissioner of Customs and Excise* 1960 3 SA 212 (N) at 216G-H as referred to in *Ndabeni v Minister of Law and Order and Another* 1984 3 SA 500 D 511E – 511F, where, with reference to the discretionary power of an official, it was held that: “...there can only be reasonable cause to believe... where, considered objectively, there are reasonable grounds for the belief... it cannot be said that an officer has reasonable cause to believe...merely because he believes he has reasonable cause to believe.”

¹⁰⁰ Hoexter *Administrative Law in South Africa* 291.

for review based upon non-compliance with substantive - as well as procedural aspects.

Apart from substantive jurisdictional facts which refer to the conditions of law or fact to be met, one also has to ensure compliance with the procedural jurisdictional facts. Procedural jurisdictional facts refer to the procedural requirements that must be met by the decision-maker when exercising his discretion.¹⁰¹ With regards to the courts' attitude towards procedural jurisdictional facts one may briefly refer to the case of *Hospital Association of SA Ltd v Minister of Health and Another, ER24 EMS (Pty) Ltd and Another v Minister of Health and Another, SA Private Practitioners Forum and Others v Director-General of Health and Others* (hereafter *Hospital Association case*).¹⁰² In this matter three applicants consolidated an application against the Minister of Health. The application was based upon the fact that the Minister promulgated regulations without a prior consultation process with interested and affected parties. The applicants contended that section 90 of the *National Health Act* (in terms of which the regulations were promulgated) specifically required that the Minister embark on a consultation process prior to promulgating the regulations. The court concurred with the applicants' submissions and confirmed that the presence or absence of a consultation process was a jurisdictional fact that could be objectively determined by the court.¹⁰³ It was thus held that in order for the exercise of the statutory power to be regarded as valid, the presence of consultation had to be objectively proven prior to the exercise of the relevant statutory power.¹⁰⁴

In the light of the above discussion regarding the role of jurisdictional facts within discretionary powers, the following points are worth keeping in mind. Firstly, as the court pointed out in the *Aid Fund case*, it is important to differentiate between jurisdictional facts that are required to be objectively present and jurisdictional facts that must subjectively be deemed to have been present by the decision-maker. It seems logical to contend that, in the instance where a provision affords a subjective discretion to an official, such a provision increases the scope of his discretion, as the

¹⁰¹ Burns *Administrative Law* 393.

¹⁰² *Hospital Association-case*.

¹⁰³ *Hospital Association case* par 17 at 54.

¹⁰⁴ *Hospital Association case* par 17 at 54.

actual existence of the relevant facts may be influenced by the official's assessment thereof. On the contrary, the official's duty to assess the objective presence of these jurisdictional facts increases regulation, as little room is left for the subjective viewpoint of a particular official. In other words, in the instance where the official has to assess the objective presence of jurisdictional facts, the power afforded to him is regarded as a guided (or narrow) one, as the empowering statute presupposes the actual presence of the fact and the official's duty is limited to ensuring compliance with the provisions of the relevant empowering statute.¹⁰⁵ On the other hand, in the instance where the provision affords the official latitude to exercise his discretion subjectively, such a duty can be regarded as an unguided (or broad) one. In such circumstances the assessment of whether or not the factors are indeed present is left to the subjective evaluation of the relevant official. However, as noted above, the fact that the official is entitled to exercise his subjective discretion in making the decision does not render the decision unreviewable.

2.4.1.2 Discretion exercised in relation to guiding factors

The second phase of the decision-making process relates to factors to be considered by the official exercising the discretion. These factors are not regarded as preconditions to the exercise of the discretion, but assists the official in reaching the most suitable decision in the particular circumstances. In order to demonstrate this one may refer to the provisions of section 12 of the MPRDA. Section 12¹⁰⁶ deals with the assistance granted to previously disadvantaged individuals in terms of the Act. Section 12(1) states that the Minister may facilitate any assistance to previously disadvantaged persons to conduct prospecting or mining operations in terms of the Act. However, section 12(3) states that, prior to facilitating the assistance mentioned in subsection 1, the Minister "must" take all relevant factors into account, including:

- (a) the need to promote equitable access to the nation's mineral resources;
- (b) the financial position of the applicant;
- (c) the need to transform the ownership structure of the minerals and mining industry;

¹⁰⁵ Burns *Administrative Law* 392.

¹⁰⁶ Section 12 of the MPRDA.

(d) and the extent to which the proposed prospecting or mining project meets the objects referred to in section 2 (c), (d), (e), (f) and (i).

Guiding factors differ from jurisdictional facts in that such factors cannot be regarded as preconditions, as is the case with jurisdictional facts. The validity of the statutory power granted to the relevant official does not depend on the presence of these factors. These factors serve only as guidance as to which aspects the Minister must consider in exercising his statutory power. In the event that no guiding factors are present, one must assume that the official will have the power to assess which factors are relevant. The above section 12(3) is a clear illustration of a broad discretion with regards to the factors to be considered, in that the provision provides that the Minister must take "all relevant factors into account" without accurately defining what all such relevant factors would be, notwithstanding the fact that the section does specify some of the relevant factors. The Minister is entitled to subjectively determine which other factors might be relevant to the exercise of the relevant statutory power.

Any administrative official that has been afforded the right to exercise a statutory power such as the power contained in section 12(3) of the MPRDA must ensure that all factors relevant to the exercise of the power are considered. It must also be ensured that the official does not overstep the statutory boundaries set by law by considering irrelevant factors. Prior to the promulgation of PAJA the prevailing position was that the judiciary will be entitled to regard an official's decision as invalid (based on his consideration of irrelevant facts) only in extreme circumstances. This position can be summed up by referring to the findings in the matter of *Estate Geekie v Union Government and Another* (hereafter *Estate Geekie case*).¹⁰⁷ In the *Estate Geekie case* Milne AJ essentially stated that a decision taken by an official may be regarded as invalid in the event that the factor taken into account was "so manifestly alien and irrelevant that no reasonable man could regard it as relevant".¹⁰⁸ However it was also reiterated that, in the event that an official *bona fide* considers a particular factor to be relevant, the court would not be permitted to interfere on the basis that it itself saw

¹⁰⁷ *Estate Geekie v Union Government and Another* 1948 2 SA 494 (N) (hereafter *Estate Geekie case*).

¹⁰⁸ *Estate Geekie case* at 511.

the factor as irrelevant.¹⁰⁹ This stance was reiterated in the case of *Minister of Law and Order v Dempsey*¹¹⁰ where Hefer JA held that:

In order not to substitute its own view for that of the functionary, a Court is accordingly, not entitled to interfere with the latter's decision merely because a factor which the court considers relevant was not taken into account, or because insufficient or undue weight was, according to the Court's objective assessment, accorded to a relevant factor.

However, with the advent of the new constitutional dispensation, the provisions of section 6(2)(e)(iii) of PAJA have exposed such decisions to statutory judicial review. Section 6(2)(e)(iii) states that a court or tribunal has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered.¹¹¹ Upon closer inspection it would seem as if section 12(3) of the MPRDA is the only relevant provision within the Act (specifically as it relates to the processing and granting of prospecting and mining right applications), that identifies specific factors to be kept in mind by the official while exercising his statutory duty. However, in order to adequately grasp the differentiation between these factors and jurisdictional facts, the above discussion was essential.

2.4.1.3 The discretionary nature of the decision

The third phase of the decision-making process relates to the administrator's choice between the various possible outcomes. In other words, one might say that this level of discretionary power refers to an official's choice between two (or more) legally valid outcomes.¹¹² In identifying an example of such a provision contained within the MPRDA one may once again refer to section 12. Section 12(2)¹¹³ states that financial assistance may be provided to previously disadvantaged persons subject to such terms and conditions as the Minister may determine. The element of choice confined within this provision relates to the fact that the official is afforded the right to identify the terms and conditions that the relevant right can be made subject to. This duty can also be

¹⁰⁹ *Estate Geekie case* at 512.

¹¹⁰ *Minister of Law and Order v Dempsey* 1988 3 SA at 35D.

¹¹¹ Section 6(2)(e)(iii) of PAJA.

¹¹² Burns and Beukes *Administrative law under the 1996 Constitution* 130.

¹¹³ Section 12(2) of the MPRDA.

seen as broad (or unguided) as no guidance is given within the statute as to what these terms and conditions should contain. In essence the administrator first has to decide whether or not the assistance must be granted. Next, it has to be determined whether the assistance will be granted on a conditional or unconditional basis. Lastly, in the event that the right or permit is in fact granted conditionally, it has to be determined which conditions the right will be made subject to.

2.4.2 Administrative principles applicable to the exercise of discretion under the MPRDA

Section 33 of the Constitution codifies every individual's right to just administrative action. Section 33(1) states that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair." With regards to mineral exploitation it must be noted that this right to just administrative action is codified and enforced in terms of section 6 of the MPRDA.¹¹⁴ Section 6(1) of the MPRDA states that any administrative process conducted or decision taken in terms of the MPRDA must be conducted or taken within a reasonable time, and in accordance with the principles of lawfulness, reasonableness and procedural fairness. Furthermore, section 6(2) states that any decision taken in terms of section 6(1), must be in writing. Based upon the provisions of section 33(1) of the Constitution and section 6(1) of the MPRDA, it is apparent that the administrative principles of lawfulness, reasonableness and procedural fairness fulfil a vital role within the country's mineral law structure. Upon conducting an analysis into the role of ministerial discretion within mineral exploitation, it seems fitting to provide a summary of the administrative principles contained in these sections as they apply to the exercise of ministerial discretion, with specific reference to instances of broad discretion.

2.4.2.1 The lawfulness of administrative discretion

The lawfulness of a decision refers to the legal validity of that particular decision.¹¹⁵ More specifically, lawfulness essentially refers to the authorisation in terms of which

¹¹⁴ Section 6 of the MPRDA.

¹¹⁵ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC) at par 56 and 58. Fundamental to our constitutional order is the principle of legality: that the exercise of public power is legitimate only where it is lawful and that

the decision was taken.¹¹⁶ Authorisation ultimately appears in the form of statutory requirements and preconditions that have to be complied with.¹¹⁷ These statutory requirements and conditions are not only contained within the empowering provision authorising the decision, but also within the Constitution, as well as in the provisions of PAJA.¹¹⁸ If any administrative action taken adheres to the statutory directives prescribed by its empowering provision, together with the provisions of the Constitution and PAJA, that action will have properly been aligned with its authorisation and will be classified as lawful.¹¹⁹ However, in the event that a decision fails to comply with any of the authorising provisions, that action will be classified as unlawful to the extent that it fails to comply with the relevant provision. Quinot¹²⁰ states that, when assessing the authorisation in terms of which a decision was taken one would have to consider various issues with regards to the action's lawfulness including what action was authorised who was authorised to take the action, and in what manner the action was authorised to be taken.

With regards to what action is authorised to be taken, section 6(2)(f)(i) of PAJA¹²¹ is of particular importance. Section 6(2)(f)(i) of the Act states that: "a court or tribunal has the power to judicially review an administrative action if the action itself contravenes a law or is not authorised by the empowering provision". This merely entails that an administrator may perform only the task that he's authorised to perform. However, it must be noted that the necessary authority to exercise a certain function may not always be expressly reflected within an empowering statute. Circumstances

no public power or function may be exercised beyond that conferred by law; Also see *Pedal Power Association v Cycling South Africa* 2014 JDR 0306 (WCC) par 20.

¹¹⁶ Quinot *Administrative Justice in South Africa* 121-143: The exercise of administrative action will be regarded as being properly authorised in the event that the decision aligns with its empowering provision. The administrator's decision will be regarded as unlawful not only in the event that it is not properly aligned with the necessary authorisation, but also in the event that the administrator mistakenly regards the action as being properly aligned with its authorisation. Thus, the requirements for lawful administrative action are twofold in that the action should not only be objectively aligned with the empowering statute, but the action must also not be made due to an error in law or fact.

¹¹⁷ Hoexter *Administrative Justice in South Africa* 253.

¹¹⁸ Quinot *Administrative Justice in South Africa* 119; Burns *Administrative law* 29.

¹¹⁹ Quinot *Administrative Justice in South Africa* 120. No other author specifically refers to the differentiation between the "what, who and how" classification of lawfulness. However this classification is extremely valuable as it provides a comprehensive and understandable explanation of the different components of the concept.

¹²⁰ Quinot *Administrative Justice in South Africa* 120.

¹²¹ Section 6(2)(f)(i) of PAJA.

may arise where an implied power is afforded to an administrator. One such example may be where an administrator has a general constitutional duty to perform a certain function. In this regard one may refer to *Minister of Works v Kyalami Ridge Environmental Association* (hereafter *Kyalami Ridge case*).¹²² In the Kyalami Ridge case the legality of the state's decision to relocate three hundred flood victims to a transit camp on state-owned land was contested. In response to the challenge on the decision the court held that:

There was no legislation that made adequate provision for such a situation, and it cannot be said that in acting as it did, government was avoiding a legislative framework prescribed by Parliament for such purposes. ... If regard is had to its constitutional obligations, to its rights as owners of the land, and to its executive power to implement policy decisions, its decision to establish a temporary transit camp for the victims of the flooding was lawful.¹²³

As can be seen from the above dictum of the court it is evident that, even though a certain decision may not have been expressly authorised by any empowering provision, the administrator may have possessed the implied authority to exercise his power in making the decision. It must be noted however, that the exercise of power by an administrator that has not been expressly or implicitly authorised will be deemed as unlawful action in terms of section 6(2)(f)(i).

As an example of unauthorised (and thus unlawful) administrative action, one may very briefly refer to the case of *Minister of Education v Harris*.¹²⁴ In this matter the Minister of Education was empowered to determine national policy for the education system in terms of section 3(4) of the *National Education Policy Act 27 of 1996*.¹²⁵ However, instead of issuing national policy, the Minister issued (what the Constitutional Court deemed as) rules. The court held that the Minister acted *ultra vires* in that, in terms of section 3(4), he was entitled to issue national policy only, which was not what

¹²² *Minister of Public Works and others v Kyalami Ridge Environmental Association* and another 2001 3 SA 1151 (CC) (hereafter *Kyalami Ridge case*).

¹²³ *Kyalami Ridge case* par 51 at 1171.

¹²⁴ *Minister of Education v Harris* 2001 2 SA 1 (CC) (hereafter *Harris case*).

¹²⁵ Section 3(4)(i) of the *National Education Policy Act 27 of 1996*: "Subject to the provisions of subsections (1) to (3), the Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system and, without derogating from the generality of this section, may determine national policy for the admission of students to education institutions, which shall include the determination of the age of admission to schools"

he had done in this case. It was held that the provisions in the circumstances could not be regarded as policy due to the fact that their language was peremptory.¹²⁶ In other words one might assume that the Minister had intended them to have binding effect.¹²⁷ When assessing the outcome in the Harris matter one is given a clear demonstration of what type of action is authorised. Specifically with regards to the link between administrative discretion and what action is authorised it seems apparent that the role of lawfulness is to ensure that the administrator is in fact granted the necessary freedom of choice and that the administrator acts in accordance with the freedom granted to him.¹²⁸ Especially in the context of broad discretion lawfulness not only aims to protect the freedom granted to the administrator, but also serves to restrict the administrator's discretion to what is authorised within the empowering provision.¹²⁹

Apart from the type of administrative action authorised, one also has to assess who is authorised to take the decision as well as how the action is authorised to be taken. With regards to the question of which administrator is authorised to take a particular decision, the following must be noted. Section 6(2)(a)(i) of PAJA¹³⁰ states that: "a court or tribunal has the power to judicially review an administrative action if the administrator who took it was not authorised to do so by the empowering provision." The general rule is that any power given to an administrator must be exercised by that particular administrator and not by any other individual.¹³¹ Quinot¹³² states that the empowering provision will more than likely indicate specifically which administrator is given the authority to perform the action. In some instances, the administrator may be entitled to delegate the exercise of the power to his or her subordinate.¹³³ In the

¹²⁶ *Harris case* par 1298G.

¹²⁷ *Harris case* par 1298G.

¹²⁸ Quinot *Administrative Justice in South Africa* 123.

¹²⁹ Quinot *Administrative Justice in South Africa* 123.

¹³⁰ Section 6(2)(a)(i) of PAJA.

¹³¹ Hoexter *Administrative law in South Africa* 262.

¹³² Quinot *Administrative Justice in South Africa* 129.

¹³³ Hoexter *Administrative law in South Africa* 262; One may also refer to section 6(2)(a)(ii)-(ii) of PAJA: "A court or tribunal has the power to judicially review an administrative action if the administrator who took it acted under a delegation of power which was not authorised by the empowering provision; or was biased or reasonably suspected of bias." Also see Hoexter *Administrative law in South Africa* 266-268, where the author confirms that an administrator may either be expressly empowered to delegate a specific function to an administrator by an

event that the lawful delegation of the power is challenged one may also encounter the provisions of section 6(2)(a)(ii). This section states that a court or tribunal may review the decision taken by an administrator if the administrator who took the decision acted under a delegation of power which was not authorised by the empowering provision.¹³⁴

Lastly one has to assess the manner in which a particular decision is authorised to be taken. This would entail assessing whether the manner in which the administrator exercised the decision conforms to the prerequisites of the relevant provisions.¹³⁵ This aspect of authorisation relates to the procedural as well as substantive preconditions¹³⁶ that underlies any administrative decision.¹³⁷ Section 6(2)(b) of PAJA¹³⁸ once again surfaces. As stated earlier, this section grants the power to a court or tribunal to judicially review an administrative action if a material procedure or condition prescribed by an empowering provision was not complied with. In the context of administrative discretion this would entail that a particular decision-maker's compliance with the prescribed jurisdictional facts would be assessed in the context of this aspect of lawfulness. Furthermore, the guiding factors contained within the empowering provision that might have to be considered by the decision-maker when exercising his discretion will also be assessed in this context.¹³⁹

When considering the judicial review of administrative discretion in terms of lawfulness reference can be made to the abuse of discretionary powers as an overarching ground for review.¹⁴⁰ This can take various forms. The abuse may appear in the form of an ulterior purpose or motive on the part of the decision-maker, in the form of bad faith

empowering provision, or may be implicitly empowered to delegate such a function to a subordinate.

¹³⁴ Section 6(2)(a)(ii) of PAJA.

¹³⁵ Quinot *Administrative Justice in South Africa* 135.

¹³⁶ See the discussion relating to substantive and procedural jurisdictional facts (or prerequisites) under paragraph 2.4.1.1.

¹³⁷ Quinot *Administrative Justice in South Africa* 136.

¹³⁸ Section 6(2)(b) of PAJA.

¹³⁹ See the discussion relating to guiding factors under paragraph 2.4.1.2.

¹⁴⁰ Hoexter *Administrative law in South Africa* 306.

(or *mala fides*), or it may refer to the decision-maker's failure to adequately apply his or her mind to the matter.¹⁴¹

Uncertainty exists with regards to exactly what is meant by an administrator's failure to apply his or her mind to a matter.¹⁴² Unlike the grounds of ulterior motive and *mala fides*, PAJA fails to make mention of the administrator's failure to apply his mind to a matter.¹⁴³ Hoexter¹⁴⁴ notes that the Act broadly refers to this principle by identifying specific instances of such behaviour. These instances include a failure to decide or consider,¹⁴⁵ and taking irrelevant considerations into account, or failing to take relevant considerations into account.¹⁴⁶ One may contend that the grounds of review contained in section 6(2)(f)(ii) are also of relevance to the administrator's failure to apply his mind. This section *inter alia* relates to the rational link between the purpose for which a decision was taken and the decision itself. However, due to close relation of rationality with the concept of reasonability, the concept will be discussed more comprehensively under 2.4.2.2.

2.4.2.2 The reasonableness of administrative discretion

With regards to the link between administrative discretion and reasonableness, the words of Wiechers¹⁴⁷ become of prominent importance. He is of the opinion that the reasonable exercise of an administrative discretion entails that the official not only considers the desirability and the efficacy of the said decision, but also compliance with all the necessary legal provisions.¹⁴⁸ The ideal of reasonableness includes reference to the concepts of rationality and proportionality.¹⁴⁹ In fact, most authors

¹⁴¹ Hoexter *Administrative law in South Africa* 307; Also see *Shidiack v Union Government* 1912 (AD) 642 at 651.

¹⁴² Hoexter *Administrative law in South Africa* 313.

¹⁴³ See Plasket and Hoexter 1987 *The South African Law Journal* 34, where the authors reiterate that there is major confusion regarding certain grounds of review. They state that the majority of these grounds of review overlap and fall within the ambit of the abuse of discretionary power.

¹⁴⁴ Hoexter *Administrative law in South Africa* 313.

¹⁴⁵ Section 6(2)(g) of PAJA: "A court or tribunal has the power to judicially review an administrative action if the action concerned consists of a failure to take a decision."

¹⁴⁶ Section 6(2)(e)(iii) of PAJA: "A court or tribunal has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered."

¹⁴⁷ Wiechers *Administratiefreg* 254.

¹⁴⁸ Wiechers *Administratiefreg* 254.

¹⁴⁹ Hoexter *Administrative law in South Africa* 340-346; Also see *Pharmaceutical Manufacturers Association of SA in Re: Ex Parte Application of President of the RSA* 2000 3 BCLR 241 (CC) 2000

regard rationality and proportionality as elements of reasonableness.¹⁵⁰ Accordingly, in order to shed more light on the requirement of reasonableness as a whole, these aspects, together with reasonableness itself, will now be discussed in greater detail. In this regard it seems fitting to commence with a discussion of exactly what rationality entails.

Lord Diplock and Jeffrey Jowell referred to irrational decisions as decisions unsupported by evidence; decisions in which there is no connection between the evidence and the reasons provided for the decision; and decisions in which the reasons themselves are unintelligible.¹⁵¹ Rationality as a legal requirement is not explicitly mentioned within the South African Constitution. However, rationality is seen as the minimum threshold to which all administrative action must adhere.¹⁵² This was confirmed in *Trinity Broadcasting (Ciskei) v Independent Communications Authority* (hereafter the Trinity case)¹⁵³ where the court held that, in reviewing the exercise of administrative action the threshold of rationality should be regarded as the minimum threshold, rather than requiring such action to comply with the higher standard of reasonableness (which standard will be discussed separately below). In assessing the rationality of a decision the court would ask whether a rational objective basis existed justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.¹⁵⁴ Apart from the abovementioned case law one also has to consider the statutory provisions of PAJA for more direct guidance. With regards to the status of rationality in terms of PAJA one may refer to section 6(2)(f)(ii)(aa)-(dd) of the said Act which states that:

A court or tribunal has the power to judicially review an administrative action if-
(f) the action itself-
(ii) is not rationally connected to

2 SA at 674 where Chaskalson CJ held that "decisions must be rationally related to the purpose for which the power was given..."

¹⁵⁰ Quinot *Administrative Justice in South Africa* 179; Also see Hoexter *Administrative law in South Africa* 340-346.

¹⁵¹ *Council of Civil Service Unions v Minister of State for the Civil Service* 1985 AC 374 (HL) 117 at 122.

¹⁵² Burns *Administrative Law* 417.

¹⁵³ *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 3 SA 346 (SCA) (hereafter Trinity case) par 20 at 353 to par 21 at 355; Also see *Bel Porto School Governing Body and others v Premier, Western Cape, and another* 2002 3 SA 265 (CC) par 46 at 282.

¹⁵⁴ Trinity case par 21 at 355; Also see *Carephone (Pty) Ltd v Marcus NO and others* 1999 3 SA 304 (LAC) par 37 at 316.

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator;¹⁵⁵

One may also lastly refer to Hoexter's definition of what constitutes irrationality. She states that a rational decision is one supported by the evidence as well as the reasons given for it.¹⁵⁶ One may contend that this definition adequately summarises the essence of rationality. The evidence to which Hoexter refers as a prerequisite for rationality refers to a rational connection between the decision and the purpose for which it was taken; by the rational connection between the action itself and the purpose of the empowering provision; and lastly, by the rational connection between the action and the information provided.¹⁵⁷

The second ideal that forms part of the constitutional reasonableness concept is proportionality. Proportionality is not listed as a ground of review in PAJA. However, section 36 of the South African Constitution incorporates this principle into the South African legal system. Section 36(1) states that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.¹⁵⁸

¹⁵⁵ Section 6(2)(f)(ii)(aa)-(dd) PAJA.

¹⁵⁶ Hoexter *Administrative Law in South Africa* 340; Also see *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 4 SA 346 (T).

¹⁵⁷ See *Pharmaceutical Manufacturers Association of SA In Re: Ex Parte President of the RSA* 2000 2 SA 674 (CC) par 85 at 708; Also see Jowell 1993 *Acta Juridica* 122 where the author states that: "By decisions that are irrational in the strict sense of that term is meant decisions 'lacking ostensible logic or comprehensible reason'. These include decisions made in an arbitrary fashion, perhaps 'by spinning a coin or consulting an astrologer'.² They also include instances where there is an absence of evidence in support of the decision, where there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no logical justification."

¹⁵⁸ Section 36(1) of the Constitution.

The reference to the fact that a limitation must be reasonable and justifiable essentially implies that there must be a balanced relation between the administrative action, its objective, and the facts and circumstances that surround it.¹⁵⁹

With regards to proportionality Hoexter¹⁶⁰ refers to the example of not utilising a “sledgehammer in order to crack a nut”. She states that the purpose of proportionality is essentially to strike a balance between the adverse and beneficial effects of an administrative decision while encouraging the administrator to consider the need for action, as well as the possibility of less drastic action, to accomplish a specific goal.¹⁶¹ With regards to discretion one may contend that proportionality requires that the exercise of discretionary power be proportionate to the objective sought to be achieved by the exercise of such discretion.¹⁶²

Apart from the requirements of rationality and proportionality, the last (and essentially overarching) principle is reasonableness itself. As already mentioned, everyone’s right to reasonable administrative action is contained in section 33(1) of the Constitution. Furthermore, section 6(2)(h) of PAJA states that:

a court or tribunal has the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.¹⁶³

This ground of review contained in section 6(2)(h) is seen as highly controversial due to its attempt to balance the tension between two contradictory judicial ideals.¹⁶⁴ On the one hand it is preferred that the judiciary would not unnecessarily intrude upon the executive’s arm by entering into the merits of administrative decisions. On the other hand, a desire exists for sufficient control to be exercised by the judiciary. Burns¹⁶⁵ finds the threshold for reasonableness within section 6(2)(h) to be excessively

¹⁵⁹ Burns *Administrative Law* 444.

¹⁶⁰ Hoexter *Administrative Law in South Africa* 344. Also see *S v Manamela* 2000 3 SA 1 (CC) par 34.

¹⁶¹ Hoexter *Administrative Law in South Africa* 344.

¹⁶² Burns *Administrative Law* 445. Also see Jowell and Oliver “Proportionality: neither novel nor dangerous” at 51 as seen in Burns *Administrative Law* 38.

¹⁶³ Section 6(2)(h) of PAJA.

¹⁶⁴ Hoexter *Administrative Law in South Africa* 327.

¹⁶⁵ Burns *Administrative Law* 438.

limiting and overbearing on the individual alleging that administrative action was exercised unreasonably.

Prior to the current constitutional dispensation a decision made by the administration could have been regarded as unreasonable only in the event that "it could be shown that a decision was so unreasonable as to lead to a conclusion that the official failed to apply his or her mind to the decision."¹⁶⁶ However, the promulgation of PAJA has effected a change in this legal position. The change was confirmed in *Mafongosi and Others v United Democratic Movement and Others*, where Jafta AJP held that:

Under common law the courts were entitled to interfere only where there was gross unreasonableness to the extent that one of the established grounds of review could be inferred from such unreasonableness. This is no longer the position. Any decision which is unreasonable falls to be set aside as not complying with the constitutional requirement.¹⁶⁷

The most important case that outlined the current legal position with regards to the notion of reasonableness was the matter of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (hereafter *Bato Star case*)¹⁶⁸. The case related to an application for the review of a decision made by an administrator. The Applicant was dissatisfied with the allocation of fishing quotas that it had received and sought to have the decision reviewed.¹⁶⁹ The application for review was successful in the High Court but was (on appeal) overturned by the Supreme Court of Appeal. The applicant then obtained special leave to appeal to the Constitutional Court against a judgment of the Supreme Court of Appeal.

¹⁶⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 SA 490 (CC) (hereafter *Bato Star case*) par 43 at 511; Also see Burns *Administrative law* 35: "Generally speaking the courts adopted a narrow approach to the question of unreasonable administrative behaviour, holding that judicial intervention was permitted only in cases where the administrative decision was so 'gross' that something else could be inferred from it – such as *mala fides*, ulterior motive, or that the person on whom the discretion has been conferred has failed to apply his or her mind to the matter."

¹⁶⁷ *Mafongosi v United Democratic Movement* 2002 5 SA 567 (TKH) par 575; Also see 1998 1 SA 270 (C) at 284, where the court went further by stating that justifiability now requires that a decision must be capable of objective substantiation. The court held that administrative action, in order to prove justifiable in relation to the reasons given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality which requirements involve a test of reasonableness. Gross unreasonableness is no longer a requirement for review.

¹⁶⁸ *Bato Star case*.

¹⁶⁹ *Bato Star case* par 1 at 498.

The judgement handed down by the Constitutional Court (and O'Regan J in particular) in the *Bato Star* case is of cardinal importance to the present discussion due to the court's findings regarding reasonable administrative action. In this matter the court emphasized that a decision made by an administrator must not be so unreasonable that no reasonable individual could have reached it, as stated in section 6(2)(h) of PAJA.¹⁷⁰ O'Regan J¹⁷¹ also held that determining whether a decision by an administrator was or was not reasonable would ultimately depend upon the circumstances of each particular matter. She held that the factors to be considered in determining the reasonableness of a decision includes the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved, and the impact of the decision on the lives and well-being of those affected.¹⁷² O'Regan J¹⁷³ emphasised that, in the event where an administrator is tasked with considering the impact of various factors when exercising his discretion, the administrator should always attempt to strike a reasonable equilibrium between any and all competing interests that might influence the outcome of the decision. What would constitute such a reasonable equilibrium is left to the discretion of the administrator.¹⁷⁴

In assessing the reasonableness of an administrator's decision it must be noted that the court's function is solely to determine whether any reasonable administrator would have reached the same conclusion as the administrator himself. On this basis one may argue that reasonableness should most definitely be regarded as a ground of review on its own, provided that a court restricts its assessment of the matter to the procedural reasonableness thereof.¹⁷⁵ The court should not be entitled to assess the

¹⁷⁰ Section 6(2)(h) of PAJA; Also see *Bato Star* case par 42 at 511.

¹⁷¹ *Bato Star* case par 45 at 513.

¹⁷² *Bato Star* case par 45 at 513. See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) par 187 at 388.

¹⁷³ *Bato Star* case par 49 at 515.

¹⁷⁴ *Bato Star* case par 49 at 515; However, when exercising his discretion in reaching such a reasonable equilibrium, the administrator must ensure that the conclusion reached is one based upon objective grounds. In this regard one may refer to the courts findings in the Hurley case at 578B; In this regard also see De Smith, Woolf and Jowell *Judicial Review of Administrative Action* at 305: where the authors stated that: "The criterion of reasonableness is not subjective but objective in the sense that it is subject to independent scrutiny."

¹⁷⁵ Hoexter *Administrative Law in South Africa* 336.

substantive reasonableness of the administrator's decision, but merely the procedural validity thereof.¹⁷⁶

In light of the above discussion it becomes clear that the overarching constitutional requirement of reasonableness (as it is contained in section 33 of the Constitution) consists of two further sub-requirements, namely rationality and proportionality. One may summarize the distinct role of each of these components as follows, starting with the concept of rationality. When assessing rationality the test contained in section 6(2)(f)(ii) of PAJA is applicable. This test entails that the decision taken by the administrator must be rationally connected to the purpose for which it was taken; the purpose of the empowering provision and the information before the administrator.¹⁷⁷ In addition, the reasons provided for the decision by the administrator must also be adequate.

The question whether any other reasonable official would have found a decision made by an administrator as unreasonable will inevitably involve an assessment of whether the decision was rational (taking into account the administrator's consideration of the evidence available to him) and proportional in relation to the adverse and beneficial consequences of the decision. In determining the reasonableness of a decision the minimum threshold of rationality must first be complied with. If an administrative action taken is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator, or the reasons given for it by the administrator, the action cannot be regarded as rational and therefore does not qualify as a reasonable decision.¹⁷⁸ The second requirement of proportionality entails that a proper balance must be achieved between the means utilised by the administrator and the consequences of the relevant administrative action.¹⁷⁹ It must be determined whether the relevant administrator exercising the administrative action considered the adverse and beneficial effects of the action. Once the action taken is deemed to have been taken with due regard to the rationality and

¹⁷⁶ Hoexter *Administrative Law in South Africa* 336.

¹⁷⁷ Section 6(2)(f)(ii) of PAJA.

¹⁷⁸ As already stated, these requirements for rational administrative action is contained in section 6(2)(f)(ii) of PAJA.

¹⁷⁹ Burns *Administrative Law* 448.

proportionality thereof, it must broadly be determined whether any reasonable administrator would have reached the same conclusion as the administrator himself.¹⁸⁰ In evaluating this the facts relevant to the decision, the circumstances surrounding the decision, as well as the expertise of the decision-maker must be known.¹⁸¹

2.4.2.3 The procedural fairness of administrative discretion

Apart from the fact that every administrative decision taken must be lawful and reasonable, section 33 of the Constitution also requires that the relevant decision be taken in a procedurally fair manner.¹⁸² Similarly section 3(1) of PAJA states that:

Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

The legal requirement of procedural fairness aims to promote the following essential components: a fair hearing, by an impartial decision-maker.¹⁸³ These ideals are reflected through the notions of *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (nobody should be a judge in his own cause).¹⁸⁴

With regards to the notion of *audi alteram partem*, it is important to note that, for any administrator to properly exercise his administrative discretion, the said administrator must be fully aware of the facts of the matter and all possible avenues that may be taken.¹⁸⁵ In order to gain such awareness regarding the circumstances of the particular matter, the administrator must ensure compliance with the requirements contained in section 3(2)(b) of PAJA, which states that:

(2) (a) ...

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

¹⁸⁰ Burns *Administrative Law* 448.

¹⁸¹ *Bato star case* par 45 at 513B.

¹⁸² Section 33 of the Constitution. Also see Baxter *Administrative Law: Legal regulation of administrative action in South Africa* 536.

¹⁸³ Hoexter *Administrative Law* 362.

¹⁸⁴ Hoexter *Administrative Law* 362.

¹⁸⁵ Hoexter *Administrative Law* 362. With regard to every individual's right to state his or her case also see *De Lange v Smuts NO* 1998 3 SA 785 CC par 131 at 836 where Mokgoro J held that: "Everyone has the right to state his or her own case, not because his or her version is A right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance."

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;
- (ii) a clear statement of the administrative action;
- (iv) adequate notice of any right of review or internal appeal, where applicable; and
- (v) adequate notice of the right to request reasons in terms of section 5.

Adherence to section 3(2)(b) of PAJA affords the party affected by administrative action adequate opportunity to present his or her side of the matter.¹⁸⁶ In this regard, one may once again refer to the *Janse van Rensburg case* where the court held that the observance of procedural fairness ensures that an administrator who has been granted wide administrative power appreciates the facts relevant to a particular administrative decision.¹⁸⁷ However, in spite of the requirements listed in section 3(2) of PAJA, it must be noted that section 3(4) of the Act also entitles the administrator to “depart from any of the requirements referred to in subsection (2)” if it is reasonable and justifiable in the circumstances.

The second component of procedural fairness known as the maxim of *nemo iudex in sua causa* aims to ensure the impartiality of the relevant administrator responsible for the administrative decision. The principle is reflected within section 6(2)(a)(iii) of PAJA, which permits the review of an administrative decision where the administrator is regarded as being biased or where a reasonable suspicion of bias exists. The maxim of *nemo iudex in sua causa* is based upon two principles of good administrative justice, the first being that the probability of sound decisions becomes more likely in the event that the administrator is impartial. The second principle relates to the public perception and refers to the fact that the public will have more faith in the administrative process in the event where justice is not only done but is seen to be done.¹⁸⁸ Accordingly, in order to ensure the above it must be guaranteed that administrators do not make decisions based upon illegitimate or personal motives.¹⁸⁹ In other words, it must be ensured that all traces of bias are removed from the decision-making process.

¹⁸⁶ Burns *Administrative Law* 257.

¹⁸⁷ *Janse van Rensburg case* par 24 at 41.

¹⁸⁸ Hoexter *Administrative Law* 451.

¹⁸⁹ Hoexter *Administrative Law* 451.

Over the years the courts have found it troublesome to identify a clear and concise test to be applied in determining whether a decision-maker's impartiality (or bias) warrants his recusal from the decision-making process.¹⁹⁰ In *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*,¹⁹¹ a matter adjudicated in the Appellate Division in 1992, the court made reference to two distinct tests or requirements to be adhered to when assessing the impartiality of a decision-maker. The first test referred to the fact that a "reasonable likelihood" of bias must be evident on the part of the decision-maker. The second test merely requires a "reasonable suspicion" of bias and thus requires compliance with a lower threshold in order to successfully attain the recusal of the decision-maker. In this matter the court held the following with regards to the most suitable threshold to be applied when determining the impartiality of a decision-maker:

Our Courts have not, in the last 20 years or so, regarded it as necessary for disqualifying bias to exist that a reasonable observer should suspect that there was a real likelihood of bias; provided the suspicion is one which might reasonably be entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker.¹⁹²

In other words, in the *BTR Industries case* the court held that the apprehension of a reasonable suspicion of bias on the part of the decision-maker would constitute sufficient grounds on which to request the recusal of the relevant administrator. This stance was confirmed by the Constitutional Court in 1999 in the matter of *President of the Republic of South Africa and others v South African Rugby Football Union and others* (hereafter SARFU case),¹⁹³ where the court's focus was similarly on establishing perceived bias rather than attempting to prove actual bias. However, even though the courts differentiated between actual bias and perceived bias in both the *BTR Industries case* and *SARFU case*, Nwauche contends that the tests applied by the courts in the respective matters are not exactly similar. Nwauche refers to the fact that in these two matters the courts formulated two different tests to determine perceived bias which

¹⁹⁰ *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 4 SA (hereafter SARFU case) par 36 at 171; Also see *BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Workers' Union and Another* 1992 3 SA 673 (A) (hereafter BTR Industries case),

¹⁹¹ BTR Industries case; Also see *S v Roberts* 1999 4 SA 915 (SCA).

¹⁹² *BTR Industries case* at 691E.

¹⁹³ *SARFU case* par 36 at 171.

test, according to him, differ immensely from each other.¹⁹⁴ He argues that the test identified by the court in the *BTR Industries case* (the “reasonable suspicion test”) differs greatly from the test identified in the *SARFU matter* (the “reasonable apprehension test”) in that the SARFU test entitles the adjudicator to determine whether bias exists, whereas the BTR Industries test affords the reasonable lay observer to determine whether bias indeed exists.¹⁹⁵ Nwauche¹⁹⁶ contends, and it is agreed, that in determining administrative bias, the test formulated in the BTR Industries matter is to be applied as it enables an “easier finding of bias necessary to maintain public confidence in the administrative system.”

Now that the two essential components of procedural fairness have been discussed in greater detail it becomes necessary to illustrate how this legal requirement has been applied in practice, and particularly within the South African mineral law regime. In *Global Pact Trading 207 (Pty) Ltd v The Minister of Minerals and Energy* (hereafter Global Pact case)¹⁹⁷ the applicant instituted an application for the reviewing and setting aside of a decision refusing the grant of a prospecting right to the applicant in accordance with section 17 of the MPRDA. The applicant in this matter had lodged an application for a prospecting right at the office of the Regional Manager: Minerals and Energy. The applicant was then subsequently informed that the application did not comply with the requirements of section 17(1)(a) and (b) in that certain documentation was deemed to be outstanding. The applicant was invited to submit the outstanding documentation and had subsequently done so. However, due to misfiling, the Regional Manager failed to present the outstanding documentation to the Director-General: Minerals and Energy, and as a result, the application was not granted.

In the Global Pact matter the court acknowledged the fact that the refusal to grant a prospecting right constituted an administrative action which must be procedurally fair as set out in section 3(1) of PAJA. In this regard the court held that the refusal to grant the prospecting permit based upon the second respondent’s failure to consider the

¹⁹⁴ Nwauche 2005 *PER* 10.

¹⁹⁵ Nwauche 2005 *PER* 16.

¹⁹⁶ Nwauche 2005 *PER* 16.

¹⁹⁷ *Global Pact Trading 207 (Pty) Ltd v The Minister of Minerals and Energy* 2008 JDR 1067 (O) (hereafter *Global Pact case*).

outstanding documentation was procedurally unfair.¹⁹⁸ In analysing the matter, Badenhorst and Carnelley¹⁹⁹ reiterated that the officials had an obligation to act in the spirit of the Constitution by acting fairly, responsibly and honestly.²⁰⁰ They concurred with the court's findings that the administrative decision taken was procedurally unfair. They reiterate that the applicant had a legitimate expectation that arose from the second respondent's invitation to the applicant to submit the outstanding documentation.²⁰¹ As a result of the second respondent's failure to ensure that the subsequently lodged documentation was considered during the application procedure, Badenhorst and Carnelley²⁰² strongly contend that the respondents did not give effect to the applicant's legitimate expectation, and therefore did not ensure the procedural fairness of the decision.

To conclude, one might state that procedural fairness is essential to the efficient functioning of any regulatory system. In the event that the decision taken by an administrator is procedurally unfair, the fundamental values of our constitutional dispensation are undermined. In order to ensure that a decision can be regarded as procedurally fair in terms of section 33 of the Constitution, it must be ensured that every party is granted an opportunity to present his case and that the administrator responsible for making the decision is unbiased. With regards to the exercise of administrative discretion (and particularly broad discretion) it is essential for any official to be fully aware of all relevant facts in order for the said official to make an accurate value judgement. Secondly, with regards to the impartiality of the said official it must be noted that the excessive quantities of money involved within the mining industry expose the industry to possible corruption (especially during the application procedure).²⁰³ The presence of direct statutory guidance may not altogether halt the said corruption, but it may play an important role in minimising it, as the presence of statutory guidance forces an official to go beyond his subjective viewpoint (albeit only to a certain extent).

¹⁹⁸ *Global Pact case* par 18 at 15.

¹⁹⁹ Badenhorst and Carnelley 2008 *Obiter* 120.

²⁰⁰ Badenhorst and Carnelley 2008 *Obiter* 121.

²⁰¹ Badenhorst and Carnelley 2008 *Obiter* 120.

²⁰² Badenhorst and Carnelley 2008 *Obiter* 121.

²⁰³ Corruption Watch 2014 *SA Mining at high risk for corruption* <http://bit.ly/2d80bIs>.

2.5 Summary

As stated above, discretionary powers refer to a decision-maker's power to choose the most suitable option when he is confronted with various legally valid options.²⁰⁴ The statutory provision affording the administrator the right to exercise his discretion can either formulate the discretion in a narrow or a broad manner.²⁰⁵ A discretionary power is narrowly formulated in the event that the empowering statute not only grants the discretion but also codifies all the statutory considerations that the administrator must consider when exercising the discretion.²⁰⁶ In other words, even though the administrator is entitled to exercise his discretion, the options available to him are narrowly defined within the empowering statute.

In the case of broadly formulated discretionary provisions the situation may be far more complex. In such instances the relevant empowering provision affording the discretion does not conclusively stipulate which statutory considerations the administrator must consider in exercising his discretion.²⁰⁷ The official is, at least to a certain extent, afforded a subjective discretion in exercising his administrative powers.²⁰⁸ With regards to the legislative formulation of provisions affording such broad discretionary powers it must be noted that the courts have on various occasions emphasised the fact that in drafting such provisions the Legislature must ensure that adequate statutory criteria (or guidance) is identified within the provision that serves to guide the official in exercising his discretion.²⁰⁹ It was held that the lack of the necessary guidance would render the provision affording the discretion unconstitutional. It was reiterated, however, that circumstances may arise where the empowering provision itself does not provide the necessary guidance. In such circumstances, in order to identify the necessary guidance the official exercising the discretion must consider the context in which the discretionary powers were given as

²⁰⁴ Par 2.1 at 7.

²⁰⁵ Par 2.2 at 8; Also see Wiechers *Administratiefreg* 249 and Burns *Administrative Law* 390.

²⁰⁶ Par 2.2 at 8; Also see Burns *Administrative Law* 390 and Wiechers *Administratiefreg* 145.

²⁰⁷ Par 2.2 at 9; Also see Burns *Administrative Law* 390.

²⁰⁸ Par 2.2 at 9; Also see Burns *Administrative Law* 390.

²⁰⁹ Par 2.3 at 10; Also see *Dawood case* par 52 at 968H and *Janse van Rensburg case* par 25 at 42.

well as the guidance provided by external legal instruments (such as regulations and charters).²¹⁰

With regards to the actual exercise of administrative discretion it must first be noted that a single statutory power may necessitate the exercise of discretionary powers in various different phases of the decision-making process. These phases may be identified as: discretion exercised in assessing compliance with jurisdictional facts (or prerequisites); discretion exercised in relation to guiding factors; and the discretionary nature of the decision itself. In exercising his discretion within these phases of the decision-making process, the administrator must first consider the guidance given by the provision affording the discretion. However, in the event that such guidance is not given within the empowering statute, it is submitted that the relevant administrator may be in a position to unilaterally identify the necessary guidance from the context in which the right was afforded to him and from all the relevant legal instruments. In other words, it is submitted that the absence of direct statutory guidance does not automatically render a discretionary power unconstitutional in that the administrator must still attempt to identify such guidance from external sources. In concluding it must be noted that the exercise of any discretionary power must be done in accordance with the constitutional requirements of lawfulness, reasonableness and procedural fairness.

3 The role of discretion within South African mineral law regimes

3.1 Introduction

In order to analyse and evaluate the role of ministerial discretionary power in the granting of rights to minerals within South Africa, it is necessary to provide an overview of the processes that regulated the granting of rights to minerals under previous, current, and proposed future dispensations. A brief historical perspective may indicate the extent of the development or change brought about by the current regime. A future perspective is indispensable in light of the proposed amendments contained in the Mineral and *Petroleum Resources Amendment Bill*.

²¹⁰ Par 2.3 at 13; Also see *Affordable Medicines case* par 38 at 268.

Prior to the enactment of the MPRDA in 2008, most regulatory mineral law matters were governed by the *Minerals Act* 50 of 1991 (hereafter Minerals Act).²¹¹ The system implemented by the Minerals Act was removed by the enactment of the MPRDA in 2004. The MPRDA replaced the property-law based system that was utilised under the Minerals Act and repealed the principles of the common law that were deemed to be in conflict with the provisions of the new regime.²¹² Both the provisions of the Minerals Act as well as the MPRDA afford significant discretionary power to state officials in processing and granting of rights to minerals.²¹³ In commencing the assessment of the role of discretionary powers within the process regulating the granting of rights to minerals within each of these legislative regimes, an analysis of such powers as were found in the *Minerals Act* will follow first.

3.2 The role of discretion in the granting of rights to minerals under the Minerals act 50 of 1991

3.2.1 Background

The *Minerals Act* took effect on 1 January 1992.²¹⁴ This Act regulated most matters pertaining to prospecting and mining rights within South Africa until it was repealed by section 110 of the MPRDA (implemented on 1 May 2004). As stated within the Minerals Act itself, one of its objects was to regulate the prospecting for, and the optimal exploitation and utilisation of minerals.²¹⁵ With regard to the Act's efficacy, Dale²¹⁶ contends that the Act enforced the deregulation²¹⁷ of the mining industry by

²¹¹ *Minerals Act* 50 of 1991 (hereafter Minerals Act).

Examples of mineral law matters governed by other legislation included: mine health and safety (regulated by the *Mine Health and Safety Act* 29 of 1996) and the prohibition of mining and prospecting activities in certain parks (regulated by the *National Parks Act* 57 of 1976).

²¹² Section 4 of the MPRDA; Leon 2012 *Journal of Energy & Natural Resources Law* 9.

²¹³ Provisions in the Minerals Act affording discretionary power to officials included, *inter alia*, section 6 (Issuing of a prospecting permit), section 7 (Prohibition or restriction on prospecting on certain land) and section 9 (Issuing of mining authorization); Provisions in the MPRDA affording discretionary powers to officials includes *inter alia* section 9 (The order of the processing of applications), section 17 (The granting and duration of a prospecting right), section 23 (The granting and duration of a mining right), section 48 (The restriction or prohibition of prospecting and mining on certain land) and section 49 (The Minister's power to prohibit or restrict prospecting or mining).

²¹⁴ Mostert *Mineral Law: Principles and Policies in Perspective* 2012 58.

²¹⁵ Long Title of the Minerals Act.

²¹⁶ Dale 1994 *Journal of Energy and Natural Resources Law* 231.

²¹⁷ *White Paper on Privatisation and Deregulation in the Republic of South Africa* 1987, which defines privatisation and deregulation as follows: Privatisation refers to the relocation of government

recognising landowners' common law rights to the minerals embedded in and under the soil of their land. In order to understand Dale's view, it is necessary first to understand the regulatory regime that preceded the Minerals Act.

For most of South Africa's legal history the *cuius est solum*-maxim has determined who possesses the right to decide whether or not minerals should be exploited within the country.²¹⁸ This principle entails that the owner of land must also be regarded as the owner of the minerals beneath the surface of the land.²¹⁹ However, the extent to which this principle prevails has always depended upon the regulatory freedom granted thereto by the system utilised by the state.²²⁰ During the Pre-Union and Post-Union periods the state enacted various pieces of legislation that contained provisions permitting the reservation of certain rights relating to minerals in favour of the state.²²¹ In other words, a landowner's right to exploit the minerals found on his own property was, in certain instances, restricted by the state's power to reserve the rights to such minerals in its own favour.²²² The implementation of the Minerals Act brought about a change in this legal position.²²³ Upon its enactment the *Minerals Act* no longer permitted the reservation of specific rights to the state in the instance where the state was not the common law rights holder of the said minerals.²²⁴ It represented a statutory authorisation system that enforced rights held in terms of Property Law principles.²²⁵

With regards to the system implemented by the *Minerals Act*, it must be noted that not all authors agreed with Dale's viewpoint that the Act enforced deregulation of the industry. Badenhorst²²⁶ is of the opinion that even though the Act vested the right to

functions, activities or property from the public to the private sector; Deregulation refers to the procedure whereby the measures taken by the state to control dealings between private parties are brought in line with the objects of its deregulation policy.

²¹⁸ Van der schyff 2012 *New Contree* 146.

²¹⁹ Van der Schyff 2012 *New Contree* 132.

²²⁰ See Mostert *Mineral Law: Principles and Policies in Perspective* 8.

²²¹ Such legislation included the: *Precious Minerals Act* 31 of 1898, *Land Settlement Act* 12 of 1912, *Reserved Minerals Development Act* 55 of 1926, *Precious Stones Act* 44 of 1927 and the *Mining Rights Act* 20 of 1967.

²²² Mostert *Mineral Law: Principles and Policies in Perspective* 45.

²²³ Mostert *Mineral Law: Principles and Policies in Perspective* 59.

²²⁴ Mostert *Mineral Law: Principles and Policies in Perspective* 59. It must be noted that the Minerals Act did not regulate any rights relating to Precious Stones or Natural Oils.

²²⁵ Dale 1994 *Journal of Energy and Natural Resources Law* 231.

²²⁶ Badenhorst 1991 *TSAR* 130.

mine in the common law holders thereof²²⁷ the extensive government control imposed by the Act through the authorisation system effectively ensured that the system amounted to neither privatisation nor deregulation of the mining industry. The relevance of this debate to the present discussion lies therein that Badenhorst²²⁸ attributes the perceived lack of deregulation and privatisation to the presence of excessive administrative discretion afforded to officials by the provisions of the Minerals Act. He believes that the state control implemented by the Act is completely unwarranted in that it affords extremely broad discretionary powers to officials.²²⁹ He argues further that the presence of the provisions that afford these discretionary powers constitutes control mechanisms which negatively impact upon the Act's aim to achieve deregulation.²³⁰ Mostert stops short of voicing an opinion as to the role of ministerial or administrative discretion in deregulation and privatisation, but also confirms that discretion played a significant role within the regulatory system imposed by the Minerals Act.²³¹ Before embarking on a discussion regarding the exact nature of such discretionary powers afforded to officials in terms of the Minerals Act, a brief summary of the regulatory system imposed by the Act will follow.

3.2.2 Regulatory structure and procedure applicable to the granting of rights

The regulatory structure provided for by the Minerals Act was enforced by way of a three-tier administrative structure. This structure consisted of the Minister of Mineral and Energy Affairs at the head, the Director-General and the Government Mining Engineer at mid-tier, and the Regional Directors and Regional Mining Engineers on the third tier.²³² This three-tier administrative structure administered the implementation of a system of statutory authorisations to regulate mineral rights held in terms of property-law principles.²³³

²²⁷ The holder could refer to either the owner of the property in question or the person that has obtained written consent to mine from the property owner.

²²⁸ Badenhorst 1991 *TSAR* 130.

²²⁹ Badenhorst 1991 *TSAR* 130.

²³⁰ Badenhorst 1991 *TSAR* 130; Mostert *Mineral Law: Principles and Policies in Perspective* 2012 72.

²³¹ Mostert *Mineral Law: Principles and Policies in Perspective* 2012 72.

²³² Mostert *Mineral Law: Principles and Policies in Perspective* 2012 59.

²³³ Dale 1994 *Journal of Energy and Natural Resources Law* 230.

In terms of the Minerals Act an applicant, who was the holder of a mineral right or had the consent of the holder of the mineral right, could apply for two distinct rights to minerals namely prospecting permits (regulated in terms of section 6) and mining rights (regulated in terms of section 9).²³⁴ The basis on which both these rights were granted was contained in section 5 of the Act, which identified two distinct preconditions that every applicant had to comply with in order for that applicant to lawfully conduct prospecting or mining operations. First, section 5(1) required that every applicant must be the holder of the right to a mineral or must have acquired the consent of such a holder to enter upon the relevant land and prospect or mine for the relevant mineral. Secondly, section 5(2) stated that:

no person shall prospect or mine for any mineral without the necessary authorisation granted to him in accordance with this Act...

Section 5(2) additionally prescribed that, once it was established that an applicant was in fact the holder of the right in question (or had obtained consent from the holder of the right) in terms of section 5(1), the said applicant had to apply for the necessary authorisation to prospect or mine in accordance with section 6 (a prospecting permit) or section 9 (a mining right) as required in terms of section 5(2).²³⁵

The application for the authorisation to mine had to comply with specified prerequisites, otherwise known as jurisdictional facts. As was discussed in paragraph 2.4.1.1, a fact is regarded as a jurisdictional fact when the legislature identifies the existence of the fact as a pre-requisite for the exercise of the relevant statutory power.²³⁶ In this regard section 6(1) (in the case of a prospecting permit) and section 9(1) (in the case of a mining right) essentially stated that in order for an application to be considered it had to be lodged with the Director: Mineral Development concerned in the prescribed form, together with payment of the prescribed application fee. Once the application of a duly authorised individual conformed to these requirements, the

²³⁴ Section 6 of the Minerals Act; Section 9 of the Minerals Act.

²³⁵ Dale 1994 *Journal of Energy and Natural Resources Law* 230: "The legal competence to obtain statutory authorisations to prospect or mine is premised on the holding of common law rights to prospect or mine."

²³⁶ Aid Fund case par 34F; see par 2.4.1.1 at 10.
Also see *Eye of Africa Developments (Pty) Ltd v Shear* 2012 2 All SA par 32 where the court held that the necessary pre-conditions must exist before a power can be exercised.

Director: Mineral Development was obliged to grant such an applicant the said authorisation. Although this process seems at face value to be fairly straightforward and mechanical, ample room existed for the exercise of administrative discretion.

3.2.3 The discretionary provisions of the Minerals Act

Under the system imposed by the Minerals Act, administrative discretion was afforded to officials in various circumstances *inter alia*, when granting and renewing prospecting permits,²³⁷ when placing prohibitions and restrictions to prospect on certain types of land,²³⁸ and when determining the terms applicable to and the period of a prospecting permit or mining authorisation.²³⁹

With regards to the granting and renewing of prospecting permits it would be useful first to provide a more detailed analysis of section 5 of the Act. Whereas section 6(1)²⁴⁰ contained the prerequisites that every applicant had to comply with in order for an application to be considered, section 6(2) prescribed where an application for a prospecting permit had to be lodged and the information and documents that had to be submitted together with the application.

Section 6(2) stated that:

Any application for a prospecting permit shall be lodged with the Director: Mineral Development concerned and shall, in addition to the other information and documents which he may require, be accompanied by-

- (a) proof of the right to the mineral in respect of the land or tailings, as the case may be, comprising the subject of the application;

²³⁷ Section 6(2) and Section 6(4) of the Minerals Act.

²³⁸ Section 7(1) of the Minerals Act.

²³⁹ Section 9(1) of the Minerals Act

Mostert *Mineral Law: Principles and Policies in Perspective* 72.

²⁴⁰ Section 6(1) of the Minerals Act: "The Director: Mineral Development shall, subject to the provisions of this Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a prospecting permit in the prescribed form authorizing the applicant to prospect for a mineral in respect of which he – (a) is the holder of the right thereto; or (b) has acquired the written consent to prospect on his own account, from such holder; In respect of the land or tailings, as the case may be, comprising the subject of the application." *Agri SA v Minister of Minerals and Energy* 2011 3 All SA 296 paragraphs 28 and 36: The court summarized the position imposed by the Minerals Act by stating that the mineral rights holder could transfer the right to prospect or mine to another party in the form of a prospecting contract or mineral lease. However, the exercise of this right by the relevant holder (or entitled entity/individual), was subject to authorisation by the State.

- (b) particulars about the manner in which the applicant intends to prospect and rehabilitate disturbances of the surface which may be caused by his intended prospecting operations; and
 - (c) particulars about the applicant's ability to make the necessary provision to rehabilitate disturbances of the surface which may be caused by his intended prospecting operations,
- acceptable to the Director: Mineral Development.

With regards to the provisions of section 6(1) it is submitted that the provisions seem to be purely mechanical and it seems that no real discretion is afforded to any official in this regard. With regards to section 6(2) it must be noted that the information and documentation contained in section 6(2)(a)-(c) were considered to be procedural jurisdictional facts due to the fact that they related to procedural requirements that had to be met by the prospective applicant.²⁴¹ This means that the legislature deemed the lodgement of this documentation and information as a procedural pre-requisite to the granting of a prospecting permit. With regards to the discretionary elements of section 6(2) it must firstly be noted that any information or documentation required in terms of the section was "in addition to the other information and documents which he (Director: Mineral Development) may" require. Exactly what such "other information and documentation" constituted is unclear, as the Act failed to stipulate it. One would assume that the Director: Mineral Development exercised his discretion in determining what such information and documentation could be, depending on the circumstances of each application. It must further be noted that the words "acceptable to the Director: Mineral Development" imply that it was irrelevant whether or not the documentation was objectively "acceptable". Instead, the Director had to subjectively determine whether the documentation was satisfactory through the exercise of his discretion.²⁴² The section itself identified no objective criteria against which the adequacy of the information (or the decision of the administrator for that matter) could be assessed.

It is submitted that this lack of objective guidance might have caused major administrative difficulties during the operation of the Minerals Act, as it cannot be

²⁴¹ See par 2.4.1.1 at 11 for a discussion regarding the nature of subjectively worded clauses.

²⁴² Aid Fund case par 35A. Also see Baxter *Administrative Law* 460-461 where the author reiterates that, in the event that an administrator is tasked with subjectively evaluating the presence of a jurisdictional fact, the only fact that actually remains jurisdictional is whether or not the administrator has indeed made the decision.

conclusively determined which information and documentation should have been lodged with the Minister in order for an application to be considered. However, the issue was never subjected to greater judicial scrutiny and was thus never ruled upon. Nonetheless, when applying the principles identified by the court in the Hurley matter²⁴³ in 1986, it is apparent that an assessment which deemed information “acceptable to the Director: Mineral Development” still had to be based on objective grounds and could therefore be objectively determined by the courts.²⁴⁴ As discussed in chapter 2, the court held in the Hurley matter that the words “if he has reason to believe” suggest that an official’s decision must have been based upon objective grounds and that, as a result, the court was entitled to assess whether such grounds reasonably existed.²⁴⁵ One may reasonably argue that the very same criterion could have been applied in instances where an official had to evaluate the “acceptability” of documentation lodged in terms of section 6(2), as in both scenario’s the official relies on his subjective judgement of the circumstances.

The abovementioned section 6(1) and section 6(2) related to the Minister’s discretion in what can be regarded as the first phase of the decision-making process. In the first phase the official assessed the application’s compliance with the relevant statutory provisions. Subsequent to assessing an application’s compliance with the requirements the official then entered the second phase of the decision-making process, which entailed deciding whether the relevant right should be granted, and in the event that it was indeed granted, the third phase involved the Minister’s power to determine the terms and conditions applicable to the right. With regards to the presence of discretionary powers during the official’s consideration of whether or not to grant or refuse an application (the second phase of the decision-making process), one may specifically refer to the provisions of section 7(1).

²⁴³ *Minister of Law and Order and Others v Hurley and Another* 1986 3 SA par 579; Also see *Walele v City of Cape Town* 2008 6 SA 129 (CC) par 160A-160B.

²⁴⁴ See par 2.4.1.1. at 13. Also see Hurley case at 579, where it was found that the phrase: “if he has reason to believe” does not constitute an entirely unfettered discretion in that the administrator’s decision had to be based upon objective grounds.

²⁴⁵ See also par. 2.4.1.1 at 19.

Section 7(1) afforded the right to the Minister to grant consent for prospecting or mining within areas in which such activities were prohibited. Section 7(1) stated that:

Subject to section 20 of the *National Parks Act* 57 of 1976, no person shall prospect in or on land which -

- (a) comprises a township or urban area;
- (b) comprises a public road, a railway or a cemetery,
- (c) has been reserved or is being used under this Act or any other law for government or public purposes; or
- (d) may be defined and so determined by the Minister by notice in the Gazette, land on which prospecting was prohibited by the Minister by notice in the *Government Gazette*.

except with the written consent of the Minister and in accordance with such conditions as may be determined by him.

In terms of section 7(1), prospecting in certain areas or on certain land was prohibited. However, as can be seen the relevant party may in fact have prospected on the prohibited land upon receipt of written consent from the Minister and on the conditions so prescribed by the Minister. Accordingly, the Minister was thus afforded the discretion to allow prospecting on prohibited land. One may argue that the purpose behind the prohibition contained in section 7 may have been undermined due to the fact that permission to prospect or mine on prohibited land may in fact have been given by the Minister.

Lastly, with regards to the official's right to determine the terms and conditions applicable to any right or consent (the third phase of the decision-making process), section 7(1) of the Minerals Act not only granted discretionary powers to the Minister to determine whether a prospecting or mining right should be granted, but also afforded a discretion to the Minister to determine the terms and conditions applicable to the right. As already stated, section 7(1) stated that mining or prospecting may occur in the listed areas only "with the written consent of the Minister and in accordance with such conditions as may be determined by him." In this regard one inevitably has to wonder what factors the Minister would have had to consider in determining whether permission should have been granted to an applicant who wished to prospect or mine on prohibited land, given that no such factors were listed in the section itself. The legislature's failure to identify the necessary factors within the section (or within any legislative provision for that matter) is a particularly distressing issue, as the section was intended to ensure the protection of the environment. An

issue that is now afforded Constitutional protection in terms of section 24 of the South African Constitution.

Section 7 was not the only provision in the Act that afforded the right to an official to subjectively determine the terms and conditions applicable to a granted right. One may also refer to the Minister's right to grant consent for prospecting or mining on state land subject to such terms and conditions as he may have deemed fit, as is contained in section 6(3), or the Director: Mineral Development's right to determine the period for which a prospecting permit or mining right was to be granted, as contained in section 6(4) and section 9(1).

Section 6(3) of the Minerals Act stated that:

If the State is the holder of the right to any mineral, the consent referred to in subsection (1)(b)²⁴⁶ may, upon written application, be granted by the Minister, subject to such terms and conditions as may be determined by him.

With regard to the provisions of section 6(3) it must be noted that, once the Minister had decided in favour of granting the consent he was entitled to rely on his subjective opinion in determining the terms and conditions that may have been applicable to such consent. Similar to the provisions of section 7(1), section 6(3) provides no clear guidance as to which factors the Minister had to consider when determining the relevant terms and conditions. It is thus unclear what exactly would have constituted reasonable terms and conditions in such a case. This point was exemplified by Kaplan and Dale,²⁴⁷ who, at the time when the Mineral Act's was still in operation, wrote with reference to section 6(3) that: "What such terms and conditions are likely to be remains to be seen."

Related to the Minister's discretion to determine the terms and conditions on which a prospecting permit or mining right was to be granted was his discretion to also subjectively determine the period for which the right was to be granted. Section 6(4) of the Minerals Act stated that: "any prospecting permit shall be issued for a period of

²⁴⁶ The consent referred to herein is the written consent that an applicant acquires to prospect in terms of section 1(b) (consent that the applicant obtains from the state in the event that the state is the holder of the relevant right, and not the applicant himself).

²⁴⁷ Kaplan and Dale *A Guide to the Minerals Act* 54.

12 months or such longer period as the Director: Mineral Development may determine".²⁴⁸ Similarly, section 9(1)²⁴⁹ of the Act stated that the Director: Mineral Development may, upon written application, issue a mining authorisation for any period determined by him. Oddly, even though most of the provisions of sections 6 and 9 corresponded, the provisions of these particular subsections differed in that section 6(4) prescribed a "period of 12 months or such longer period as the Director: Mineral Development may determine" whereas section 9(1) stated that the Director shall issue a mining authorisation "for a period determined by him." In other words, in terms of section 6(4), the period of 12 months was prescribed for a prospecting permit. However, the Director was not obliged to keep to this prescribed period and was afforded a discretion to determine a longer period. On the other hand, section 9(1) contained no prescribed period and afforded an entirely unguided discretionary power to the Director to determine the period for which to grant a mining authorisation.

3.2.4 Summary

Under the Minerals Act the presence of discretion within the granting of rights to minerals was evident in specific areas. These areas can be identified as: when granting and renewing prospecting permits;²⁵⁰ when placing prohibitions and restrictions on prospecting on certain types of land;²⁵¹ and when determining the terms applicable to, and the period of, a prospecting permit and mining authorisation.²⁵²

In light of the above discussion one would have to submit that the provisions of the Act afforded broad discretionary powers to officials. When one considers the discretion

²⁴⁸ Section 6(4) Minerals Act.

²⁴⁹ Section 9(1) Minerals Act: "The Director: Mineral Development shall, subject to the provisions of this Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a mining authorization in the prescribed form for a period determined by him authorizing the applicant to mine for and dispose of a mineral in respect of which he-

(a) is the holder of the right thereto; or

(b) has acquired the written consent of such holder to mine therefor on his own account and dispose thereof, in respect of the land or tailings, as the case may be, comprising the subject of the application."

Dale 1994 *Journal of Energy and Natural Resources Law* 230: "The legal competence to obtain statutory authorisations to prospect or mine is premised on the holding of common law rights to prospect or mine."

²⁵⁰ Section 6(2) and Section 6(4) of the Minerals Act

²⁵¹ Section 7(1) Minerals Act.

²⁵² Section 9(1) Minerals Act; Mostert *Mineral Law: Principles and Policies in Perspective* 72.

afforded in terms of sections 6, 7 and 9 of the Act, it becomes apparent that most of the provisions lacked sufficient statutory guidance.²⁵³ Most of the provisions in the Act affording officials the right to exercise discretionary powers contained subjective elements which granted the officials unwarranted freedom, which in itself must be seen as distressing, particularly as the Act's intention was to strive towards deregulation of the mining industry. In this regard one has to agree with Badenhorst that the provisions of the Act did not contribute to deregulation of the mining industry at all. It may be said that the powers afforded to the state were not adequately constrained. In order to assess this evaluation one has to consider the attitude of the courts towards the said powers. However, due to a lack of judicial authority dissecting the role of the said discretion in terms of the Act during that period, the position remains unclear. In retrospect one may argue that in drafting the Minerals Act the legislature should have ensured that any provisions granting discretionary powers to the Minister: Mineral Development or the Minister of Mineral and Energy Affairs (or any other official for that matter), contained the necessary objective guidance. Such guidance would have been essential for two reasons. Firstly, the identification of an objective criteria would have ensured that the official did not attribute weight to irrelevant considerations in making the decision. Secondly, in a mineral regime based upon property law principles, the presence of objective considerations in legislation would have enforced legal certainty. Under the Minerals Act the *cuius est solum* maxim applied, save for the fact that authorisation still had to be obtained in order to actually conduct prospecting or mining. The owner of land thus owned the minerals embedded under the soil. With this in mind one may contend that the presence of objective considerations within the relevant legislation would have been in landowners' best interest as the landowners would then have been assured that decisions regarding their property were based upon predefined considerations and not upon the relevant official's own subjective judgement. In order to determine whether the South African Legislature has once again afforded state officials such broad discretionary powers in its drafting of the current MPRDA, an analysis of the said Act will now follow.

²⁵³ See par. 3.2.3.

3.3 The role of discretion in the Mineral and Petroleum Resources Development Act 28 of 2008

3.3.1 The background and regulatory structure

Upon its commencement the MPRDA repealed the provisions of the Minerals Act and replaced the private property-law based system of mineral regulation with a system of state custodianship enforced by way of an administrative structure.²⁵⁴ The Act's promulgation followed the drafting of the Minerals and Mining Policy White Paper of 1998 (hereafter the White Paper). The White Paper articulated a policy directed at creating a more efficient regulatory system within the mining industry while facilitating equitable access to the mining industry to previously disadvantaged groups.²⁵⁵ The White Paper also placed emphasis on sustainable environmental management, so as to ensure that the society meets the development needs of the people while simultaneously minimising the impact of development on the environment.²⁵⁶ Subsequent to the drafting of the White Paper, the MPRDA was approved by Parliament in 2002.²⁵⁷ The rationale behind the act's implementation was:

to make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources; and to provide for matters connected therewith.²⁵⁸

²⁵⁴ Leon 2012 *Journal of Energy & Natural Resources* 9. See *Xstrata South Africa (PTY) Ltd and others v SFF Association* 2012 5 SA 60 (SCA) at paragraph 1 on page 62, where the Supreme Court of Appeal (hereafter SCA) held that: "It (the MPRDA) fundamentally altered the legal basis upon which rights to minerals in South Africa are acquired and exercised. Previously such rights vested in the owner of the land on or under which minerals were found. The owner of the land, or a party authorised to do so by the owner, could exploit the minerals, subject to the person exploiting the minerals possessing a mining authorisation in terms of the *Minerals Act* 50 of 1991. Once the Act came into operation all mineral resources vested in the state as the custodian of such resources on behalf of all South Africans."; Also see *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd and others* 2011 1 All SA 364 (SCA) at paragraph 20 on page 370 where the SCA held further that: "Under the new Act (MPRDA), the previous system of common law mineral rights as controlled through a system of statutory authorisations to prospect or mine under the Minerals Act 50 of 1991, was completely superseded by a new administrative system whereby:

- (a) the common law mineral rights were replaced by similar rights granted by the Minister of Mineral Resources; and
- (b) the statutory authorisations such as mining licences or prospecting permits were fused into the prospecting or mining right thus granted."

²⁵⁵ *Minerals and Mining Policy White Paper*, 1998 par 1.1.2.

²⁵⁶ *Minerals and Mining Policy White Paper*, 1998 chapter 4 at 51.

²⁵⁷ Leon 2012 *Journal of Energy & Natural Resources* 8.

²⁵⁸ Long Title of the MPRDA; Also see Leon 2012 *Journal of Energy & Natural Resources* 8 where the author holds that the MPRDA was enacted to address certain socio-economic and political concerns within the mining industry; Also see *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC)

Supplementary matters which the Act sought to address was the promotion of employment, the advancement of the social and economic welfare of all South Africans, and the encouragement of industrial and economic growth while promoting the ideal of sustainable development²⁵⁹ - something which, according to the Constitutional Court in the matter of *Minister of Mineral Resources v Sishen Iron Ore (Pty) Ltd* (hereafter Iron Ore case), its predecessor had failed to adequately address.²⁶⁰

In the Iron Ore case the court provided an outline of the differences between the MPRDA and the previous Minerals Act. The court confirmed the MPRDA's shift away from the private ownership of minerals, a system which, in the court's view, largely coincided with the apartheid's regime.²⁶¹ It was held that the system of private ownership of minerals excluded previously disadvantaged individuals from the mining industry in that certain prohibitions of law prohibited such individuals from freely acquiring the ownership of property.²⁶² Hence, the model of state custodianship was instituted by the MPRDA in order to open up opportunities for previously disadvantaged individuals to take part in the country's mining industry.²⁶³

This state custodianship-model utilised by the MPRDA identifies the state as the custodian of all mineral and petroleum resources in the country. With regard to the functioning of the custodianship model it must be noted that this system condensed the previous system of state authorisations, granted upon rights held in terms of

A at paragraph 1 on page 3, where the Constitutional Court reiterated that the MPRDA was implemented to address the gross economic inequality in the mining industry that existed during the apartheid regime and that arose due to previously disadvantaged individuals' landlessness, exclusion and poverty.

²⁵⁹ Section 2(c), section 2(f) and section 2(h) of the MPRDA.

²⁶⁰ *Minister of Mineral Resources v Sishen Iron Ore (Pty) Ltd* 2014 2 SA 603 (CC) (hereafter *Iron Ore case*) par 15 at 611.

²⁶¹ *Sishen Iron Ore case* par 15 at 611.

²⁶² *Sishen Iron Ore case* par 13 at 610.

²⁶³ *Sishen Iron Ore case* par 13 at 610; Also see Cawood 2004 *The Journal of the South African Institute of Mining and Metallurgy* 58, where the author emphasizes certain fundamental issues when comparing the provisions of the MPRDA to those of the previous Minerals Act.²⁶³ Firstly, he notes that the emphasis of the new act is on granting equitable access to mineral resources.²⁶³ Secondly, he states that the concept of rehabilitation has given way to the wider norm of sustainable development.²⁶³ Lastly, he emphasises the fact that the new act makes significant empowerment of previously disadvantaged individuals possible; Also see *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* 2011 1 SA 364 (SCA) par 24 at 371: "All these considerations together with the repeal of the 1991 Act resulted in the destruction of common law mineral rights and the administrative controls which previously regulated the acquisition and utilisation of rights."

common law principles, into one process.²⁶⁴ The current process entails that the state grants the right to mine (a right previously held in terms of property law principles) and also grants the necessary authorisations to mine within the same process.²⁶⁵ In essence, the MPRDA constitutes a system of administrative decision-making. The state-custodianship model is defined in section 3²⁶⁶ of the MPRDA. Section 3(1)²⁶⁷ states that all mineral and petroleum resources within the country are the common heritage of all citizens and identifies the state as the custodian of these resources. Uncertainty exists as to the exact impact that this system has with regard to the ownership of minerals within the country. In this regard the Constitutional Court held in *Agri SA v Minister for Minerals and Energy* that:

The MPRDA, subject to the transitional arrangements, put an end to the rights without necessarily transferring them to the state. For purposes of this case, it is not necessary to define the word "custodian". What is however clear, is that whatever "custodian" means, it does not mean that the state has acquired and thus has become owner of the mineral rights concerned.²⁶⁸

Notwithstanding the court's findings above, the reality is that the provisions of section 3(1) (read with section 5) effectively annihilated landowners' and common law holders of mineral rights' entitlements to exploit the minerals embedded in the soil of the land which they owned or over which they had acquired the mineral rights.²⁶⁹ Badenhorst and Mostert²⁷⁰ contend that for practical purposes it is entirely irrelevant where the ownership of the country's minerals rests. They reiterate that, no matter where the ownership of the Republic's minerals vests, it is clear that each and every holder of a

²⁶⁴ Mostert *Mineral Law: Principles and Policies in Perspective* 2012 113.

²⁶⁵ Mostert *Mineral Law: Principles and Policies in Perspective* 2012 113.

²⁶⁶ Section 3(1) MPRDA: "Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans"; The introduction of the state custodianship model in section 3 of the MPRDA has been exposed to its fair share of criticism. Van der Schyff (Van der Schyff 2006 *The Constitutionality of the Mineral and Petroleum Resources Development Act* 237) has described the said system as one of the most debated legislative provisions enacted during the last 5 years. The formulation of the model within the particular section clearly indicates a shift away from the property law-based mineral regime. However, most authors caution that the introduction of the system cannot necessarily be seen as a move towards nationalisation of the mining industry (Van den Berg 2009 *Stellenbosch Law Review* 145).

²⁶⁷ Section 3 MPRDA.

²⁶⁸ *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) par 71 at 24; Also see *Xstrata South Africa (Pty) Ltd v SFF Association* 2012 5 SA 60 (SCA) A par 7-8 at 65 and *Holcim SA Pty Ltd Prudent Investors (Pty) Ltd* 2011 1 SA 364 (SCA).

²⁶⁹ Van der Schyff 2008 *TSAR* 766.

²⁷⁰ Badenhorst and Mostert 2007 *TSAR* 479.

mineral right must apply to the state for the necessary authorisation to conduct mining operations in terms of the acquired right.²⁷¹ Van den Berg²⁷² expresses the opinion that, due to the uncertainty regarding the impact of section 3(1) on the ownership of minerals, emphasis must be placed on the actual powers afforded to the state in terms of section 3(2). Section 3(2) elaborates on the functioning of the state-custodianship model by identifying certain powers that the state may exercise in this system. Section 3(2)²⁷³ states that the state (acting through the Minister) may *inter alia* grant, issue, refuse and administer a prospecting permit, a mining permit, or a mining right. For purposes of the present discussion, one may argue that these powers serve as a mandate to designated state officials to exercise their discretion in such a manner as to ensure that mineral resources are exploited for the benefit of all South Africans as is required in terms of section 3(1) of the Act.

The provisions of section 3 emphasise the fact that the state is afforded great regulatory power where the exploitation of the country's mineral resources are concerned. Nevertheless, Van der Schyff²⁷⁴ cautions that the state's power should not be regarded as unrestricted due to the provisions of, specifically, section 3(1). She emphasises that although this section affords considerable discretion to the state in determining how mineral resources should be managed by the state-custodian, no decision taken by an administrative official may be prejudicial to the public interest.²⁷⁵ Herein lies the need to determine the administrative regulatory framework within which the state-custodian must exercise the statutory powers afforded by the MPRDA. If the state-custodian is empowered to grant mining rights, the extent of the state-

²⁷¹ Badenhorst and Mostert 2007 *TSAR* 479.

²⁷² Van den Berg 2009 *Stellenbosch Law Review* 145.

²⁷³ Section 3(2) MPRDA: "As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may –
 (a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and
 (b) in consultation with the Minister of Finance, prescribe and levy, any fee payable in terms of this Act".

²⁷⁴ Van der Schyff 2008 *TSAR* 767.

²⁷⁵ Van der Schyff 2008 *TSAR* 767.

custodian's discretionary powers throughout the application- and granting processes as prescribed in the MPRDA must be determined.

3.3.2 The presence of discretion within the state-custodianship model's application procedure

Dale et al stated that the success of the ideal of state custodianship depends on the extent to which ministerial discretion is constrained.²⁷⁶ They reiterate that no legal system can be entirely void of administrative discretion and are of the opinion that one of the most important considerations that must be kept in mind when assessing the effectiveness of an administrative decision to grant, renew or cancel a mining right, mining permit, mining licence etcetera is the extent to which an administrative discretion is limited by the presence of an objective criteria.²⁷⁷ One is most definitely inclined to agree with this statement. However, when assessing the authors' application thereof on the provisions of the MPRDA, the position becomes slightly more complex.

Dale et al²⁷⁸ argue that, apart from certain widely formulated discretionary provisions contained in the MPRDA, the administrative discretion afforded to state officials in terms of the MPRDA is to a large extent well constrained and regulated through reference to stipulated objective criteria.²⁷⁹ As basis for this contention they refer to the Act's requirement that all administrative action must be taken within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.²⁸⁰ They also refer to certain mechanisms in the Act which, in their opinion, constitute sufficient limitation of the officials' discretion. These mechanisms include the Act's utilisation of a "first in, first assessed" (FIFA) principle to deal with

²⁷⁶ Dale "Comparative International and African mineral law as applied in the formation of the new South Africa mineral development legislation" in Bastida, Walden and Warden-Fernandez.

²⁷⁷ Dale "Comparative International and African mineral law as applied in the formation of the new South Africa mineral development legislation" in Bastida, Walden and Warden-Fernandez *International and comparative mineral law and policy: trends and prospects* 2005 823, 832.

²⁷⁸ Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum law (Service issue 17) par 14.1.4 at 18.

²⁷⁹ Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum law (Service issue 17) par 14.1.4 at 18.

²⁸⁰ Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum law (Service issue 17) par 14.1.4 at 18.

conflicting applications rather than considering each conflicting application on merit; and the Act's utilisation of a system of compulsory granting or compulsory refusal of rights, permits and permissions with reference to certain objective criteria, which said criteria will be discussed below in conjunction with the relevant section of the MPRDA identifying them.²⁸¹

The actual effectiveness of the abovementioned mechanisms thought by Dale et al to restrict an official's discretion will be discussed later within the context of the processing and granting procedure. As will be seen from the discussion, it can be conceded that these mechanisms might constrain the discretion of the relevant officials to a certain extent in that they would limit the exercise of his subjective judgement. However, one may also submit that notwithstanding the existence of these mechanisms, the discretion afforded to officials in terms of the Act (both in the provisions referred to by Dale et al as well as various other provisions) cannot be regarded as adequately circumscribed. Various provisions in the processing and granting procedure utilised by the MPRDA contain discretionary elements.²⁸² These provisions might afford the relevant state official the right to exercise his discretion at different stages of the decision-making process, and the degree of discretion afforded to the official in terms of the provision might differ, depending not only on the wording of the provision, but also on the particular circumstances applicable. In order to determine the exact role of discretion within the processing and granting of prospecting and mining rights it is necessary to outline the procedure applicable to the processing of such rights and simultaneously identify the role of discretion within each phase of the procedure.

²⁸¹ Section 9 of the MPRDA; Section 10 of the MPRDA; Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum Law (Service issue 17) par 14.1.4 at 18.

²⁸² Apart from the discretionary provisions relevant to the processing and granting of prospecting rights, mining rights and mining permits, various other provisions within the MPRDA contain discretionary elements. Some of the most prominent of these discretionary provisions include: Section 12 (the Minister's power to facilitate assistance to historically disadvantaged individuals to conduct prospecting and mining operations on such terms and conditions as the Minister himself may determine), Section 26 (the Minister's power to promote beneficiation of prescribed minerals that can be mined optimally, on such terms and conditions as he may determine), and section 52 (The Board and Minister's power to request that a mining right holder take corrective measures if they are of the opinion that minerals are not being mined optimally).

3.3.2.1 The submission of an application

Any applicant wishing to apply for a prospecting right, mining right or mining permit must lodge such application in accordance with section 16 (in the case of a prospecting right, section 22 (in the case of a mining right) or section 27 (in the case of a mining permit). The provisions of sections 16 and 22 are substantively similar and they will therefore be discussed together. In terms of sections 16(1) and 22(1),²⁸³ an applicant who wishes to apply for a prospecting right or mining right must lodge the application at the office of the Regional Manager in whose region the land is situated in the prescribed manner, together with the prescribed non-refundable application fee. Sections 16(2) and 22(2) oblige the Regional Manager to accept the application if it conforms to the requirements listed in subsection (1); if no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and if no prior application has been accepted for the same mineral on the same land, which remains to be granted or refused.²⁸⁴ Subsection (3)²⁸⁵ states that the Regional Manager must notify the applicant in writing within 14 days of the receipt of the application in the event that the application does not conform to the requirements of this section.

Section 16(4) and section 22(4) state that once the Regional Manager has accepted the application he must, within 14 days of such acceptance, notify the applicant of the need to submit the relevant environmental reports required in terms of chapter 5 of the *National Environmental Management Act*;²⁸⁶ consult with the landowner, land occupier and any other interested and affected party in the prescribed manner, and include the results of such consultation in the relevant environmental reports. Lastly, section 16(5) states that, once the applicant submits such documentation as is required in terms of subsection (4), the Regional Manager must forward the application to the Minister of Mineral Resources for consideration. With regard to the presence of discretion in sections 16 and 22, it is submitted that the powers afforded to the

²⁸³ Section 16(1) and section 22(1) of the MPRDA.

²⁸⁴ Section 16(2) and 22(2) of the MPRDA.

²⁸⁵ Section 16(3) and 22(3) of the MPRDA.

²⁸⁶ *National Environmental Management Act* 107 of 1998 (hereafter NEMA). In terms of section 24 of the NEMA the term "relevant reports" may refer *inter alia* to any prescribed report, any environmental management programme, and any specialist report, where applicable..

Regional Manager in terms of these provisions can be seen as purely mechanical. The Regional Manager is not afforded a discretion in accepting or rejecting the application. He must merely assess the application's compliance with the requirements set out in the sections.

The provisions of section 27 are mostly similar to those of sections 16 and 22. However, the sections are different in some respects. Firstly, whereas sections 16 and 22 regulate the powers of the Regional Manager only once the application is submitted to him, section 27 regulates the powers of the Regional Manager as well as the powers of the Minister in considering the application. Section 27(1) identifies the criteria for the issuing of a mining permit. The section states that a mining permit may be issued only if the mineral in question can be mined optimally within a period of two years; and the mine in question does not exceed 5.0 hectares in extent. Section 27(2) corresponds with the provisions of sections 16(1) and section 22(1) and prescribes the manner in which the application must be submitted. Section 27(3) also states that the Regional Manager must accept an application for a mining permit if the application conforms to certain objective requirements. Section 27(6) also addresses the Minister's obligation to issue the mining permit.

3.3.2.2 Consideration of the application

Once the Regional Manager accepts the application for a prospecting right, mining right or mining permit he is obliged to forward the application to the Minister for consideration.²⁸⁷ In this regard it must be noted that the Minister himself or his delegate ultimately grants or rejects the application, not the Regional Manager.²⁸⁸ While considering applications for prospecting rights, mining rights or mining permits the Minister might be called upon to exercise his discretion during various different phases of the decision-making process. The first (and most important) phase relates

²⁸⁷ Section 16(5) of the MPRDA states that: "Upon receipt of the information referred to in subsection 4(a) and (b) (relevant environmental reports and the results of consultation with the landowner and the land occupier), the Regional Manager must forward the application to the Minister for consideration."

²⁸⁸ Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum law (Service issue 17) par 133.6.4 at 212.

The designated state official in this instance is the Minister of Mineral Resources. However, the Minister may delegate the powers afforded to him to the Director-General, Regional Manager or any officer, in terms of section 103 of the MPRDA.

to his duty to decide upon the order in which the lodged applications will be considered. This is done in terms of section 9 of the MPRDA. Section 9(1) of the Act states that:

If a Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received-

- (a) the same day must be regarded as having been received at the same time and must be dealt with in accordance with subsection (2);
- (b) different days must be dealt with in order of receipt.²⁸⁹

With regard to section 9(1)(a) it is submitted that, at first glance, the provisions of this section may not be seen as distressing with regards to discretion as it merely prescribes how applications received on the same day must be dealt with.²⁹⁰ Similarly, section 9(1)(b) seems to be mechanical and merely prescribes that applications received on different days must be dealt with in the order of their receipt. The procedure contained within section 9(1)(b) has been identified as the FIFA ("First in First Assessed") system.²⁹¹ This system requires of the Minister to assess applications in the order in which they are received.²⁹² Accordingly, it is expected of the official to disregard all subsequent applications until the prior applications have been considered.²⁹³ It may seem as if the currently utilised FIFA system effectively transfers most regulatory control from the Minister to the regulatory system itself, as the official is not permitted to weigh up the various applications based on their merit.²⁹⁴ An objective criterion (which states that applications are to be assessed in order of their receipt) is identified that must be adhered to irrespective of the official's viewpoint with regard to the

²⁸⁹ Section 9(1) of the MPRDA.

²⁹⁰ One may argue that the provisions of section 9(1)(a) also detracts from the "first in first assessed" – system, the fact that applications received on the same day are not processed in order of receipt but are all regarded as having been received at the same time.

²⁹¹ In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd and others* 2011 4 SA 113 9CC (hereafter *Bengwenyama case*) the applicant (Bengwenyama) applied to the court for the setting aside of the Deputy Director-General's decision to grant a prospecting right to the respondent (Genorah). The respondent received the right upon supposed compliance with the requirements set by the MPRDA. However, the applicant contended that the respondent had not embarked on the necessary public participation process required in terms of section 10 of the MPRDA. In this case it was held that the Deputy Director-General was duly authorized by the minister to grant the right. It was found that in doing so, the decision was taken on behalf of the Minister. It was argued that the respondent's application had to be dealt with first, as it had been received prior to the applicant's application.

²⁹² Dale, Bekker, Bashall et al. 2013 *LexisNexis Mineral and Petroleum Law* (Service issue 17) 111.

²⁹³ Dale, Bekker, Bashall et al. 2013 *LexisNexis Mineral and Petroleum Law* (Service issue 17) 111.

²⁹⁴ Dale, Bekker, Bashall et al. 2013 *LexisNexis Mineral and Petroleum Law* (Service issue 17) 155.

various applications. However, the discretionary element of section 9 surfaces when one considers the link between section 9(1)(a) and section 9(2).

Section 9(2) of the MPRDA²⁹⁵ states that:

When the Minister considers applications received on the same day he or she must give preference to applications from historically disadvantaged persons.

It is submitted that, from the outset, the provisions of section 9(1)(a) detracts from the functioning of the “first in first assessed” – system in that applications received on the same day are not processed in order of receipt but are all regarded as having been received at the same time. Furthermore, with regards to section 9(2)²⁹⁶ uncertainty exists as to which applicant will enjoy preference if numerous applications are received from historically disadvantaged individuals on the same day, seeing as the section does not make provision for any process to assist in deciding which applicant will be successful in such circumstances.²⁹⁷ Similarly, it seems uncertain which applicant will enjoy preference in the event that numerous applications are received on the same day but none from historically disadvantaged persons.²⁹⁸ Technically, it would seem as if the Minister would be obliged to approve all relevant applications in these circumstances.²⁹⁹ It seems as if the only viable solution in this regard would be to invoke the presumption of legislative interpretation against absurdities as only one party may be granted the relevant right.³⁰⁰ It seems as if, in such circumstances, section 9(2) requires of the Minister to consider all applications from historically disadvantaged individuals (or non-disadvantaged individuals) on the merits of each application and utilise his discretion in order to identify the most suitable applicant.³⁰¹

This discretion afforded to the Minister in terms of section 9(2) forms the basis of the present study towards the role of discretionary powers. This is due to the fact that the power afforded in terms of this section relates to an issue great importance in our new

²⁹⁵ Section 9(2) of the MPRDA.

²⁹⁶ Section 9(2) MPRDA.

²⁹⁷ Dale, Bekker, Bashall et al 2013 LexisNexis Mineral and Petroleum Law (Service issue 17) 111. Also see Mostert *Mineral Law: Principles and Policies in Perspective* 91.

²⁹⁸ Van Niekerk 2015 *Obiter* 398.

²⁹⁹ Dale, Bekker, Bashall et al 2013 LexisNexis Mineral and Petroleum Law (Service issue 17) 111.

³⁰⁰ Dale, Bekker, Bashall et al 2013 LexisNexis Mineral and Petroleum Law (Service issue 17) 112. Also see Badenhorst, Mostert and Dendy “Mineral and Petroleum” par 14.

³⁰¹ Dale, Bekker, Bashall et al. 2013 LexisNexis Mineral and Petroleum Law (Service issue 17) 111.

Constitutional dispensation, namely the empowerment of historically disadvantaged individuals. The MPRDA itself attaches significant importance to the empowerment of historically disadvantaged communities not only by codifying it as an objective in section 2(d) of the Act, but also by requiring the development of a broad-based socio-economic empowerment Charter that enforces the entry of historically disadvantaged individuals into the mining industry.³⁰²

With regard to the provisions of section 9(2) itself, it must be noted that even though the provision gives preference to applications received from historically disadvantaged individuals, the failure of the section to elaborate on the procedure to be followed in identifying the successful one amid several such applicants might place the efficacy of the provision in doubt. The Minister will undoubtedly have to make use of his discretion to determine which applicant is successful. Consequently, as the exercise of ministerial discretion is classified as administrative action, the actual validity of the discretion contained in the section must first be assessed with reference to the relevant principles of administrative law.

3.3.2.2.1 The influence of principles of administrative law

It must be ensured that any provision granting discretionary powers to officials complies with the relevant administrative law principles identified by the courts. In this regard reference can once again be made to the findings in the *Dawood* case, the *Janse van Rensburg* case, and the *Affordable Medicines* case. In the *Dawood* matter the court held that the legislature's failure to identify the relevant criteria that must be considered when exercising a discretionary power introduces an element of arbitrariness that is inconsistent with constitutional values.³⁰³ This stance was

³⁰² See Badenhorst 2014 *Journal of Energy and Natural Resource Law* 11 where the author emphasizes that: "What makes the MPRDA in the present context legally unique is that it constitutes mining legislation that was enacted in order to achieve land, water and related reform, in order to redress the results of past racial discrimination." Also see *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (CC) para. 1 and 2, where the court held that the MPRDA was enacted to address gross economic inequality and facilitate equitable access to opportunities in the mining industry.

³⁰³ *Dawood case* par 58 at 970I. Also see De Villiers 2006 *SAJHR* 423 where the author expressed the opinion that: "the policy guidelines required by the *Dawood* judgement should contain the detail necessary to serve their purpose".

reiterated in the *Janse van Rensburg* case, where the court once again emphasised the need for the provision of guidance in cases where a discretion has been granted to an official.³⁰⁴ It is clear that section 9(2) of the MPRDA fails to give direct guidance as to how an official's discretion should be exercised. In fact, the section fails to address the discretion (or any applicable procedure for that matter) at all. Accordingly, it cannot be said that the legislature, in drafting the provision, identified any criteria relevant to the exercise of the statutory power. Does this position then inevitably render the provisions of section 9(2) arbitrary and unconstitutional? In answering this vital question, the court's findings in the *Affordable Medicines* case fulfils a crucial role. In this matter the court held that, even though the provision affording the discretion did not itself provide adequate guidance, the discretion afforded therein could be adequately constrained by the context in which it was given.³⁰⁵ The court then made reference to the limitations contained in government policy as well as other relevant provisions and legal instruments.

With regard to the present discussion, the findings in the *Affordable Medicines* case essentially necessitate that the adequacy of the discretion contained in section 9(2) is assessed not only with reference to by reference to the guidance given by the section itself but also with reference to other provisions of the MPRDA as well as certain legal instruments established in terms of the Act, such as the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry.³⁰⁶ In this regard the focus will firstly shift towards the role played by other relevant provisions of the MPRDA.

3.3.2.2.2 The influence of other MPRDA provisions

Other provisions found within the MPRDA that may not only influence the discretionary powers afforded to the Minister in terms of section 9 but also necessitates the exercise of discretion itself are sections 17 and 23. In the event that the Minister is confronted

³⁰⁴ *Janse van Rensburg case* par 25 at 42.

³⁰⁵ *Affordable Medicines case* par 38 at 268D-E.

³⁰⁶ As reflected in the vision of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (hereafter Mining Charter), the aim is to create an industry that will proudly reflect the promise of a non-racial South Africa; However, see Mathews 2014 <http://bit.ly/Z6JGS0>, where it is stated that the results of the mining charter review demonstrate that the industry still has a long way to go to achieve transformation.

with two applications from historically disadvantaged individuals for the same mineral on the same land, and the applications have been received on the same day, the Minister, in deciding which applicant should be granted the relevant right, may have to consider both applicants' compliance with sections 17 and 23 as a differentiating factor. The applicant that conforms to the requirements of the sections to a greater degree should then be granted the relevant right or permit. With regard to sections 17 and 23, it must be noted these sections also constitute the second phase in the Minister's consideration of applications. No prospecting right or mining right will be granted unless the applicant complies with the prerequisites found in section 17,³⁰⁷ in the case of a prospecting right, or section 23, in the case of a mining right.³⁰⁸ Upon examination of section 17 and 23, it is apparent that the requirements referred to constitute jurisdictional facts, in that the Legislature has identified the existence of these factors as a pre-requisite for the granting of a relevant right. This is the system of compulsory granting or refusal of rights referred to by Dale et al.³⁰⁹ The system requires that the Minister must grant the relevant right to the applicant if the application adheres to certain requirements. However, due to the abstract nature of these factors, the Minister's assessment of whether an application meets these requirements' minimum threshold may be rather complex. In this regard one may first refer to section 17(1)³¹⁰ which states that:

³⁰⁷ Also see *Minister of Mineral Resources v Mawetse SA Mining Corporation (Pty) Ltd* 2015 JDR 2308 SCA (hereafter Mawetse case). The Mawetse case concerned the validity of the Director-General's decision to disregard one applicant's application for a prospecting permit due to the fact that the permit had allegedly already been successfully granted to another applicant. In this matter the right was granted to the appellant on the condition that he complied with the provisions of section 2(d) of the MPRDA, as contemplated in section 17(4) of the Act. The appellant failed to comply with these conditions and as a result the respondent applied to have the appellant's prospecting permit declared invalid. In this matter the court reiterated that the Minister may act only within the parameters conferred upon her by a legislative provision. However, it was held that the appellant's permit was in fact invalid due to the fact that he failed to comply with the conditions subject to which the permit was granted, being that he had to comply with the provisions of section 2(d).

³⁰⁸ See par 2.3.1 at 26.

³⁰⁹ Footnote 65 at 80. Also see Sections 17 and 23 of the MPRDA and Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum Law (Service issue 17) par 14.1.4 at 18.

³¹⁰ Section 17(1) of the MPRDA. Also see section 23(1) of the MPRDA, which states that:

- (1) Subject to subsection (4), the Minister must grant a mining right if –
 - (a) the mineral can be mined optimally in accordance with the mining work programme;
 - (b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;
 - (c) the financing plan is compatible with the intended mining operation and the duration thereof;

The Minister must within 30 days of receipt of the application from the Regional Manager, grant a prospecting right if –

- (a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;
- (b) the estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme;
- (c) the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;
- (d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);
- (e) the applicant is not in contravention of any relevant provision of this Act; and
- (f) in respect of prescribed minerals the applicant has given effect to the objects referred to in section 2(d).

Sections 17(1) and 23(1) are fundamentally similar, but for different phrasing and terminology.³¹¹ The only substantial inclusion contained in section 23(1) that is not to be found in section 17 is section 23(1)(e), which obliges the applicant to provide the prescribed social and labour plan. With regard to the requirements contained in sections 17(1) and 23(1) it is noteworthy that the Minister's power to assess compliance with the requirements cannot be regarded as a subjective one. He is obliged to objectively assess whether the requirements contained in the sections have been met.³¹² As a result, the question whether such jurisdictional facts are present is objectively justiciable by a court of law. However, even though the presence of the requirements itself is objectively determined, the interpretation of exactly what constitutes each requirement may require subjective judgement. In this regard

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- (d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;
 - (e) the applicant has provided for the prescribed social and labour plan;
 - (f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996).
 - (g) the applicant is not in contravention of any provision of this Act; and
 - (h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.

³¹¹ Due to the similar nature of sections 17 and 23 of the MPRDA, reference to one of these sections also includes reference to the corresponding provision in the other section.

³¹² See *Aid Fund* case par 34H. Also see Baxter *Administrative Law* 460-461: "Hence, where a public authority enjoys a discretionary power of choice concerning the existence and significance of the factual preconditions for the general exercise of its powers, the only fact that remains 'jurisdictional' is whether the public authority has made the choice."

reference can be made to certain requirements that may demand subjective interpretation by the Minister concerned.

One may firstly refer to the requirement that every applicant must have access to financial resources and must have the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme, as is contained in sections 17(1)(a) and 23(1)(b). The issue that arises with regards to these sections is that it fails to provide a minimum threshold of financial and technical capabilities that the relevant applicant should possess, nor does it provide for a process whereby such a threshold can be determined.³¹³ As a result, prospective applicants are unable to ascertain what level of financing and technical ability is regarded as the bare minimum. Accordingly, one may assume that the adequacy of a particular applicant's capabilities will be determined by the Minister through the exercise of his discretion.

With regards to the influence that sections 17(1)(a) and 23(1)(b) have on the discretionary powers found within section 9(2), it must be noted that when the Minister is inclined to weigh up applications based on merit due to the receipt of various applications from previously disadvantaged applicants on the same day, one may argue that an applicant's provision of the necessary financial funding and technical ability could go a long way in determining which applicant should ultimately receive the relevant right or permit. Due to the specialist knowledge and large amount of funding required to conduct mining operations, one would assume that the Minister

³¹³ Section 5 of the *Mineral and Petroleum Resources Development Act Regulations* GN R527 of 2004 (hereafter MPRDA Regulations) goes so far as to prescribe certain documents that an applicant has to submit in order to prove his technical and financial capabilities but fails to provide guidance as to exactly what capabilities are regarded as adequate. Section 5(1)(h) states that the prospective applicant must prove his technical abilities by providing documentary proof as to his ability to:

- (i) conduct the proposed prospecting operation in accordance with the prospecting work programme; and
- (ii) to mitigate, manage and rehabilitate relevant environmental impacts;
- (iii) comply with relevant provisions of the *Mine Health and Safety Act*, 1996 (Act 29 of 1996);

Similarly section 5(1)(j) of the MPRDA Regulations calls upon the applicant to prove his financial capabilities by providing documents concerning:

- (i) Loan agreements entered into for the proposed prospecting operation;
- (ii) a resolution by a company to provide for the finances required for the proposed prospecting operation; and
- (iii) any other mechanism or scheme providing for the necessary finances for the proposed prospecting operation.

will consider each party's ability to provide the best possible level of technical and financial stability prior to granting the relevant permit or right. However, in the event that numerous previously disadvantaged applicants possess more or less the same technical ability and funding, the question of discretion would ultimately surface once again, as no further guidance is provided as to how the most suitable candidate should be identified.

The second requirement found within sections 17 and 23 to be complied with by any prospective applicant who wishes to obtain a prospecting right or mining right relates to environmental considerations and authorisations found in NEMA.³¹⁴ Sections 17(1)(c) and 23(1)(d) of the MPRDA states that the Minister must grant the prospecting right if the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued.

With regard to the first part of these sections it has been contended that the adjective "unacceptable" applies to all three concepts which it precedes, essentially referring to unacceptable pollution, unacceptable ecological degradation and unacceptable damage to the environment.³¹⁵ The question that arises is what exactly constitutes "unacceptable" pollution, degradation or damage to the environment? Dale et al.³¹⁶ contends that the threshold of unacceptability implies non-compliance with the provisions of section 24 of the Constitution, which requires that the environmental, economic and social interests of any particular activity must be adequately balanced. This assessment seems fairly accurate but still fails to provide dependable criteria in terms whereof one can objectively define unacceptability. Accordingly, it is submitted that the relevant Minister has to exercise his subjective discretion in determining whether specific pollution, degradation or damage to the environment is indeed acceptable. With regards to this requirement's link to the order of the processing of

³¹⁴ NEMA.

³¹⁵ Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum Law (Service issue 17) par 157.8 at 232.

³¹⁶ See Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum law (Service issue 17) par 157.8 at 232, where the authors contend that: "the concept of unacceptability finds its origin in the constitutional balancing of environmental needs with economic development, which is to be found in section 24 of the Constitution."

applications as regulated in terms of section 9, it is once again submitted that the manner in which a prospective applicant will be able to mitigate pollution, degradation or damage to the environment will heavily influence his chances of being granted the relevant right.

With regard to the second part of sections 17(1)(c) and 23(1)(d), which requires that the applicant obtain the relevant environmental authorisation, it must first be noted that Section 38A of the MPRDA³¹⁷ has bestowed the power upon the Minister of Mineral Resources to implement all environmental provisions in terms of NEMA for purposes of prospecting, mining, exploration, production or activities incidental thereto.³¹⁸ In other words, this entails that the Minister of Mineral Resources not only has to consider the application for the prospecting right or mining right in terms of the provisions of the MPRDA, but must also consider the relevant environmental authorisation in terms of NEMA.³¹⁹ In fact, section 38A(2) of NEMA effectively states that the receipt of the necessary environmental authorisation is a precondition that must be obtained prior to an applicant being issued the relevant prospecting right or mining right. For purposes of the present discussion it is argued that the requirement to obtain the necessary environmental authorisation can be seen as the first requirement to be met by an applicant prior to the Minister considering the applicant's compliance with all the other requirements contained in sections 17(1) or 23(1), as this compliance with this requirement is objectively assessable in that the applicant has either acquired the necessary environmental authorisation or he hasn't.

The procedure whereby the Minister considers the relevant application for environmental authorisation also affords him some discretionary power. It is to be found in section 240 of NEMA. The mentioned section 240 lists the criteria to be taken into account by the Minister when considering applications for environmental authorisations. They include *inter alia* any pollution, environmental impacts or

³¹⁷ Inserted by section 32 of the *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008

³¹⁸ Section 38A(1) of NEMA; See Graham 2015 *Inside Mining* 10; Also see *Maccsand (Pty)Ltd v City of Cape Town* 2012 4 SA 181 (CC) (hereafter Maccsand case) paras. 21-24 and Humby 2013 *Stellenbosch Law Review* 62, for a discussion on the recent history of the interrelationship between NEMA and the MPRDA in South Africa as it relates to environmental authorisations.

³¹⁹ Graham 2015 *Inside Mining* 10.

environmental degradation likely to be caused if the application is approved or refused; and, where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment. It is submitted that these factors are of an excessively subjective nature in that the assessment thereof will vary depending upon the opinion of the individual concerned.

Another provision within the MPRDA that is of vital importance in determining the manner in which an official must exercise his discretion in terms of section 9 is section 2 of the Act, which contains the objects of the Act. All decisions, particularly the exercise of ministerial discretion, initiated in terms of the MPRDA must be made in such a manner as to promote the objects of the Act.³²⁰

3.3.2.2.3 The influence of the MPRDA's objects and the provisions of the Mining charter

Section 2 of the MPRDA³²¹ states that the objects of the Act are, *inter alia*, to give effect to the state's right to hold custodianship over all minerals within the Republic;³²² to promote equitable access to the mineral and petroleum resources within the Republic;³²³ to expand upon opportunities for women and disadvantaged communities to enter into and benefit from the minerals and petroleum industries;³²⁴ to promote economic growth and development within the mineral and petroleum industry within South Africa;³²⁵ and lastly, to give effect to section 24 of the Constitution by ensuring that the nation's mineral resources are developed in an orderly and ecologically sustainable manner.³²⁶

In the matter of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (hereafter *Bengwenyama case*) the court stated that the abovementioned objects are to be enforced by placing the exploitation of all mineral resources firmly within the

³²⁰ Section 4 of the MPRDA.

³²¹ Section 2 of the MPRDA.

³²² Section 2(b) of the MPRDA.

³²³ Section 2(c) of the MPRDA.

³²⁴ Section 2(d) of the MPRDA.

³²⁵ Section 2(e) of the MPRDA.

³²⁶ Section 2(h) of the MPRDA.

control of the State.³²⁷ In determining which applicant should be granted the relevant prospecting right or mining right in terms of section 9 of the Act, the Minister should consider each application's adherence to and enforcement of the objects set out in section 2. In order to illustrate how the relevant official should consider the impact of these objects prior to making his decision, one of them will briefly be considered. This will be the object of promoting equitable access to the nation's mineral and petroleum resources to all the people of South Africa, which is contained in section 2(c).

The object places an onus on the state to administer the state-custodianship model in such a manner as to bring about transformation, but it fails to precisely stipulate how this is to be achieved.³²⁸ This then, is where the discretion of the official plays a significant role. It is left to the official's discretion to determine how to enforce transformation within the state custodianship model.³²⁹ However, the official's discretion must be exercised within the confines of the affirmative action measures identified by the Constitutional Court in the matter of *Minister of Finance v Van Heerden*.³³⁰ In this matter the court identified certain requirements to which all affirmative action measures must comply.³³¹ Firstly, the beneficiaries of such actions must have been historically disadvantaged by discrimination. Secondly, the measures taken must be reasonably capable of achieving the desired outcomes. Lastly, the measures must not undermine the overarching constitutional goal of promoting equality.

It is thus clear that these requirements constitute objective guidelines to any official aiming to enforce transformation through his administration of the state custodianship model. The relevance hereof lies therein that the Minister, in determining which applicant should be granted the right in terms of section 9, must consider the Act's aim of achieving transformation, and in promoting transformation may exercise his discretion (within the relevant boundaries) in order to ultimately select the successful applicant.

³²⁷ *Bengwenyama case* par 31 at 125.

³²⁸ Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum Law par 84.1 at 118.

³²⁹ Dale, Bekker, Bashall et al. 2013 South African Mineral and Petroleum Law par 84.1 at 118.

³³⁰ *Minister of Finance v Van Heerden* 2004 6 SA 121 CC paras 37–44.

³³¹ *Minister of Finance v Van Heerden* 2004 6 SA 121 CC paras 37–44,

With regards to the other objects contained in section 2, it is apparent that all of these objects may play a vital role in differentiating between similar applicants. For instance, section 2(d) once again suggests that applicants from historically disadvantaged groups must be given preference. However, this section clearly highlights the interests of historically disadvantaged women and children. In other words, in determining which applicant should receive the right, the Minister may consider which applicant to prefer in order to contribute optimally to the empowerment of historically disadvantaged woman and children. Lastly, with regards to the objects contained in sections 2(e) and 2(h) the Minister may also be inclined to consider which prospective applicant would contribute more substantially to economic growth and sustainable development.

In the event that the relevant administrative law principles, together with the provisions of sections 17 and 23 of the MPRDA and the objects of the Act, cannot provide effective guidance to the Minister in determining which applicant should be granted the relevant right in terms of section 9(2), the Minister may also consider, as a differentiating factor, the extent to which the relevant applications adheres to the provisions of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry.³³²

The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (hereafter referred to as "the Mining Charter") is a Government instrument implemented in 2012 and designed to effect sustainable growth and meaningful transformation of the mining industry.³³³ The Mining Charter seeks to³³⁴ promote equitable access to the nation's mineral resources to all the people of South Africa; to substantially and meaningfully expand opportunities for historically disadvantaged

³³² *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* GN 838 in GG 33573 (hereafter Mining Charter).

³³³ The Mining Charter was implemented in accordance with the provisions of section 100 of the MPRDA. Section 100(2) of the MPRDA states that: "To ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources."

³³⁴ Section 1 of the Mining Charter.

South Africans to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources; to utilise and expand the existing skills base for the empowerment of historically disadvantaged South Africans and to serve the community; to promote employment and advance the social and economic welfare of mine communities and major labour sending areas; to promote the beneficiation of South Africa's mineral commodities; and to promote the sustainable development and growth of the mining industry.

In terms of the Mining Charter, holders of prospecting and mining rights are obliged to strive towards specific objectives with regards to transformation. These objectives relate, *inter alia*, to ownership, procurement and enterprise development, beneficiation, human resources development, mine community development, housing and living conditions and sustainable development. Some goals contained in the charter included attaining 26% black ownership of mines by 2014 and attaining a 40% historically disadvantaged demographic at executive management level, senior management level, core and critical skills level, middle management level and junior management level by 2014. However, the efficacy of the Charter has been questioned by various specialists within the Mining industry, and as a result, a new Charter is in the legislative process.³³⁵

3.3.3 Summary

As previously stated, the provisions of section 9 of the MPRDA and its role within the processing and granting of rights to minerals essentially form the basis of the present study. Section 9 regulates the order in which all applications for prospecting and mining rights are processed and is of vital importance to the proper functioning of the entire processing and granting procedure as the correct interpretation and application thereof enhances fairness and legal certainty in the system.

It is submitted that the provisions of section 9 (as well as certain other provisions within the MPRDA regulating the granting of rights to minerals) afford excessively

³³⁵ Mgabadeli 2016 <http://bit.ly/2cW39LD>; Leon 2016 <http://bit.ly/2ebCInd>; Creamer 2016 <http://bit.ly/2dXK6HJ>.

broad discretionary powers to the Minister of Mineral Resources. The section stipulates that applications are to be processed on a “first in first assessed” basis with applications from historically disadvantaged applicants enjoying preference in the event that numerous applications are received on the same day. However, it is submitted further that the section fails to address the applicable procedure to be followed where numerous applications are received from historically disadvantaged applicants on the same day or where no such applications are received and many are received from non-historically disadvantaged applicants. It is submitted that in order for the Minister to select the successful applicant, the said Minister must exercise his subjective discretion. Due to the Act’s failure to address the applicable procedure to be followed or to identify any considerations that might be relevant to the exercise of the Minister’s discretion, it is submitted that the provision does not comply with the principles of administrative law discussed in the *Dawood case* and the *Janse van Rensburg case*. However, this statutory shortcoming does not ultimately render the provisions of section 9 unconstitutional, as the *Affordable Medicines case* extended the parameters of what would constitute sufficient statutory guidance. It is then expected of the Minister to identify the necessary guidance by considering external legal sources such as other provisions within the MPRDA, the objects of the MPRDA, and the guidance given by certain other legal instruments such as the Mining Charter.

3.4 The Mineral and Petroleum Resources Amendment Bill 15B of 2013

The current legal position under the MPRDA stands to be dramatically altered in the near future. In December 2012 the draft *MPRDA Amendment Bill* was approved.³³⁶ The Bill was enacted *inter alia*, to remove certain ambiguities contained within the MPRDA, to improve the regulatory system imposed by the MPRDA, and to streamline all relevant administrative processes.³³⁷ However, the provisions of the Bill have come under excessive scrutiny from various role players within the South African Mining industry. In this regard one may refer to Peter Leon,³³⁸ who states that the enactment of the Bill might have an extremely detrimental effect on investor confidence, as it is laden

³³⁶ The MPRDA Amendment Bill was published in GG 36037 of 27.

³³⁷ MPRDA Amendment Bill.

³³⁸ Seccombe <http://bit.ly/2dHbgAt>

with excessive discretion and various other hindrances that will ultimately contribute to great regulatory uncertainty. Other specialists within the industry also state that the Bill fails to address the complexities of the original Act and essentially places more power in the hands of the Department of Mineral Resources (hereafter DMR).³³⁹

The adoption of the MPRDA Amendment Bill has been subject to major delays. Even though it was published for comment in December 2012, it is yet to be passed. This is due to various reasons, including uncertainty as to its Constitutionality. On the 11th of March 2014 Parliament's Mineral Resources Committee voted in favour of the amendments and the controversial piece of legislation managed to clear its first hurdle with ease more than a year ago.³⁴⁰ The Bill was then swiftly approved by the National Council of Provinces on the 27th of March 2014.³⁴¹ However, in January 2015 the President of the Republic sent the Bill back to Parliament for reconsideration.³⁴² The reasons for this decision by the presidential office related to its alleged unconstitutionality.³⁴³ The grounds for arriving at this judgement are not clear. However, it is believed that the referral might relate to the failure to follow due process when the Bill was processed by the National Council of Provinces.³⁴⁴

It is apparent, then, that extreme uncertainty exists with regard to the status and constitutionality of the MPRDA Amendment Bill. In light of Peter Leon's opinion that the Bill contains excessive administrative discretion, it seems necessary to conduct an investigation as to the precise role of ministerial discretion within the piece of legislation. Only once the provisions of the said Bill have been considered in their entirety may one accurately determine its value within the future regulation of mineral resources in the Republic. In this regard, one may firstly refer to section 5 of the Bill and its influence on section 9 of the MPRDA.

It has already been stated that section 5 of the Bill proposes the deletion of the entire FIFA system contained within section 9 in order to replace it with an invitation system

³³⁹ Cornish 2012 *Inside Mining* 8.

³⁴⁰ Vecchiatto Mineral amendment bill on its way to becoming law <http://bit.ly/2dHbVBA>.

³⁴¹ Anon 2014 NCOP approves MPRDA amendments <http://bit.ly/2dNaA9A>.

³⁴² Anon 2015 Zuma asks Parliament to Reconsider Resources Bill <http://bit.ly/2e5anC2>.

³⁴³ Anon 2015 Zuma asks Parliament to Reconsider Resources Bill <http://bit.ly/2e5anC2>.

³⁴⁴ Anon 2015 Zuma asks Parliament to Reconsider Resources Bill <http://bit.ly/2e5anC2>.

(or so-called “tender system”). In terms of this model the Minister may invite applications for prospecting rights, mining rights and mining permits in respect of any area or land, by notice in the *Government Gazette* (see footnote for the full wording of the section).³⁴⁵ The section states that the Minister must prescribe a certain timeframe in which applications for the specific area will be accepted.³⁴⁶ However, the section fails to address the exact procedure to be followed when many applications have been received. The only guidance that the section offers as to which applicant should enjoy preference in terms of the invitation system is contained in section 9(5), as amended.³⁴⁷ The proposed section 9(5) will state that the Minister shall give preference to an application from an individual referred to in subsection (2). Subsection (2) refers to an individual who has identified a specific piece of land as well as a specific mineral present on that land, and has subsequently requested the Minister to invite applications for such area in terms of section 9(1).³⁴⁸ In other words, the proposed amended of section 9 entails that, in the event where an applicant identifies land on which he would like to conduct mining or prospecting activities, that applicant may request of the Minister to invite applications for the said land (in terms of subsection

³⁴⁵ Section 5 MPRDA Amendment Bill:
“Invitation for applications”

“9(1) The Minister must by notice in the Gazette, invite applications (including in respect of land relinquished or abandoned or which was previously subject to any right, permit or permission in terms of this Act, which has been cancelled or relinquished or which has been abandoned, or which has lapsed) for reconnaissance permissions, reconnaissance permit, prospecting rights, exploration rights, mining rights, technical co-operation permit, production rights and mining permits, in respect of any area of land, block or blocks, and may prescribe in such notice the period within which any application may be lodged with the Regional Manager and the procedures which must apply in respect of such lodgement.

(2)

(3) Applications received in terms of subsection (1) must be processed in accordance with the provisions of the Act, including the terms and conditions upon which applications must be accepted, rejected, granted or refused.

(4) Any invitation referred to in subsection (1) must not include any mineral, mineral product or form of petroleum and land in respect of which another person holds right or permit (excluding a reconnaissance permit or reconnaissance permission and an application made in terms of section 11

(2A), or an application for a right or permit which has already been lodged prior to such invitation, and which remains to be granted or refused

(5)

³⁴⁶ Section 5 MPRDA Amendment Bill.

³⁴⁷ Section 5 MPRDA Amendment Bill - Section 9(5): The Minister shall, when processing applications, give preference to an application lodged by a person referred to in subsection (2).”

³⁴⁸ Section 5 MPRDA Amendment Bill – Section 9(2): Any person may, after identifying an area of land, block or blocks and the type of mineral, mineral product or form of petroleum in or on such area or land, request the Minister to invite applications in such area of land, block or blocks in terms of subsection (1)

2) after which that party's application will enjoy preference (in terms of section 9(5)). This seems to be fair as the applicant that brought the land to the Minister's attention will ultimately be the one whose right enjoys preference. However, it remains to be seen if all other auxiliary administrative decisions made in terms of the newly proposed section 9(1) will be successful in the absence of any objective criteria to assist the Minister in the exercise of his discretion.

With reference to the role of discretion in the amended section 9 of the MPRDA Bill, it may be important to refer to the interrelated proposed amendments in section 16 and section 22 of the original MPRDA. As noted from the above discussion, these sections currently contain the requirements for a prospecting right or mining right to be granted. In addition to this, the newly proposed amendments to section 16 and section 22 (as contained in section 11(a) and 17(a) of the MPRDA Amendment Bill) will also state that any application for a prospecting permit or mining right is subject to the provisions of section 9. Uncertainty exists as to exactly what the effect of this amendment would be. One might contend that the fact that section 16 and 22 will now be subject to the provisions of section 9 means that all applications for prospecting and mining rights will have to be lodged through the invitation system that is to be implemented by the proposed section 9.

4 Conclusion

As previously stated, the South African mining industry plays a vital role in the country's economic development. Over the years the mining industry has served as the powerhouse of the South African economy due to its creation of employment opportunities, its attraction of foreign income, and its promotion of community development.³⁴⁹ It is therefore important that the industry should be sufficiently regulated. In order to achieve such regulation the legislature enacted the MPRDA in 2002. The purpose behind the enactment of the MPRDA was to provide equitable access to and sustainable development of South Africa's mineral resources; and to provide for other matters connected therewith.³⁵⁰ Notwithstanding the above the Act

³⁴⁹ See paragraph 1 and footnote 1.

³⁵⁰ See paragraph 3.3.1 and footnote 243.

has not effectively regulated the mining industry within the country, and particularly the processing of applications for rights to minerals.³⁵¹

One of the shortcomings in the regulation is the unnecessarily broad discretion afforded to the Minister of Mineral Resources in the processing and granting of rights to minerals. As discussed above, it is submitted that various provisions contained in the MPRDA regulating the granting of rights to minerals are laden with varied degrees of Ministerial discretion.³⁵² In light of this submission the purpose of the present study was to conclusively determine what exactly is the role, nature and extent of the ministerial discretionary powers expressly or implicitly provided for in the MPRDA, with specific reference to the processing and granting of prospecting and mining right applications. In order to achieve the above purpose the study addressed two aspects. Firstly, a thorough examination of the role, nature and extent of ministerial discretion in South Africa's current constitutional dispensation was conducted;³⁵³ and secondly, an assessment of the previous, current and proposed future mineral law regimes in South Africa was conducted, with specific emphasis on the presence of ministerial discretion in the granting of rights to minerals.³⁵⁴

Discretion refers to an official's choice between various legally valid options where no option can objectively be regarded as right or wrong.³⁵⁵ It plays a vital role in most legal jurisdictions around the world and provides an avenue whereby the legislature can make provision for unforeseeable situations, in that it affords the relevant decision-maker the power to assess the circumstances of a particular matter and make his decision accordingly, instead of being confronted with normative rules that might not be helpful in the relevant circumstances. A distinction is made between the legislative formulation of discretion and the actual exercise of such discretion. With regards to the Legislative formulation of discretion it has been highlighted that any provision affording discretionary powers to an official must provide the necessary statutory guidance to the official in order to avoid the provision being regarded as

³⁵¹ See paragraph 1 and footnote 7.

³⁵² See paragraph 3.3.2.2.

³⁵³ See paragraph 2.

³⁵⁴ See paragraph 3.

³⁵⁵ See footnote 30.

unconstitutional and arbitrary.³⁵⁶ It was confirmed, however, that the guidance does not necessarily have to be found within the empowering statute, but may also be found within the broader context in which the powers to be exercised, such as government policies or other external sources.³⁵⁷

On the other hand, with regard to the actual exercise of discretionary powers, it must be noted that any individual tasked with exercising his discretion must ensure that they are exercised in accordance with the principles of lawfulness, reasonableness and procedural fairness.³⁵⁸ With regards to the lawfulness of a particular decision, it must be determined whether the particular action taken was authorised, whether the particular individual taking the action was authorised to do so, and whether the manner in which the action was taken was duly authorised.³⁵⁹ Once the action taken properly aligns with these authorisations, it can be said that the decision taken was lawful. With regard to the requirement of reasonableness³⁶⁰ it must be noted that any action taken must firstly conform to the minimum standard of rationality. Administrative action will be regarded as rational in the event that the action taken is rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator, and the reasons given for it by the administrator. Secondly, it must be determined whether, in taking the action, a proper balance was achieved between the means utilised by the administrator and the consequences of the relevant administrative action.³⁶¹ Once compliance with these principles is confirmed, one may consider the overarching principle of reasonableness. This entails assessing whether any reasonable administrator would have reached the same conclusion as the administrator who took the decision. With regard to the last requirement, that of procedural fairness, it must be ensured that every party is granted an opportunity to present his case and that the administrator responsible for making the decision is unbiased.³⁶²

³⁵⁶ See paragraph 2.3.

³⁵⁷ See paragraph 2.3.

³⁵⁸ See paragraph 2.4.

³⁵⁹ See paragraph 2.4.2.1.

³⁶⁰ See paragraph 2.4.2.2.

³⁶¹ Burns *Administrative Law* 448.

³⁶² See paragraph 2.4.2.3.

To summarise the position in South Africa relating to discretionary powers, one may thus state the following. Firstly, the obligation lies upon the legislature to ensure that provisions affording discretionary powers provide suitable guidance to officials and adequately constrain the discretion afforded to the officials through reference to stipulated objective criteria. However, the legislature's failure to provide such guidance and limitation does not automatically render the provision invalid. In instances where the empowering provision granting the discretion to the official does not directly restrict such discretion through the identification of objective criteria, it is sufficient to argue that the discretion afforded to the official may be adequately constrained through the context in which the power was given.³⁶³ In other words, in the absence of objective guidance the official is obliged to consider the indirect guidance provided *inter alia* by related legislation and other legal instruments, regulations, and government policies. With this legal position in mind, one may now briefly summarise the position relating to the presence of ministerial discretion within the regulation of the processing and granting of prospecting and mining rights, as is found within the MPRDA.

As previously stated, the discretion found within section 9 of the MPRDA forms the basis of the present study towards the role of ministerial discretion within the granting of rights to minerals. Section 9 (which regulates the order of processing of applications) is devoid of the necessary statutory guidance.³⁶⁴ It utilises a first in first assess system to process applications received on different days, and gives preference to applications received from historically disadvantaged applicants in the event that many applications are received from historically disadvantaged applicants. However, the section fails to address the order in which competing applications should be processed in the event where numerous applications are received from historically disadvantaged applicants on the same day, or where no historically disadvantaged applicant lodges an application and numerous non-historically disadvantaged applicants lodge applications on the same day. It is submitted that in such circumstances the only viable outcome

³⁶³ See paragraph 2.3 at page 13; Also see *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) par 38 at 268.

³⁶⁴ See paragraph 3.3.2.2 at 62.

would be to argue that the Minister, in considering the various applications, may utilise his discretion in selecting the successful applicant.

With regards to the validity of such discretion afforded to the Minister in terms of section 9, it is clearly apparent that the Legislature has failed to provide any objective criteria that might restrict the Minister's discretion or serve as guidance to him in exercising such discretion. Consequently, one has to consider whether the context in which the right was given adequately restricts such discretion so as to ensure that no arbitrary or unconstitutional discretionary powers are present. It is submitted that the discretion afforded to the official may be adequately constrained by various factors, including certain other provisions in the MPRDA,³⁶⁵ the objects of the MPRDA (as contained in section 2 of the Act),³⁶⁶ and the guidance given by certain other legal instruments such as the Broad Based Socio-Economic Empowerment Charter for the Mining Industry. In essence, it is argued that in selecting the successful applicant amid several historically disadvantaged applicants in terms of section 9, the Minister must consider the relationship between these various external factors. As held in the *Bato Star* case, it is essential that the Minister strikes a reasonable equilibrium between all of the relevant factors in selecting the successful applicant.³⁶⁷

In striking such an equilibrium the Minister must firstly consider the influence of other provisions within the MPRDA, and particularly, the applicant's compliance with section 17 and 23 of the Act. As stated above, sections 17 and 23 contain pre-requisites to which all applicants must adhere. The problem with regards to the interpretation of such requirements is that the provision does not identify minimum thresholds indicating what would constitute compliance with the requirements. Thus, in the context of section 9, the Minister essentially assesses which applicant complies with the provisions of sections 17 and 23 to a greater extent, rather than merely assessing simple compliance with such requirements. In illustration of the point one may refer to sections 17(1) and 23(1), where it is required that the applicant possess the necessary technical and financial capabilities prior to an application being granted in

³⁶⁵ Such as section 17 and 23 of the MPRDA (discussed under paragraph 3.3.2.1.2).

³⁶⁶ As discussed under paragraph 3.3.2.1.3.

³⁶⁷ *Bato Star case* par 49 at 515.

his favour. It is uncertain what exactly would constitute adequate technical and financial capabilities. As a result, the Minister has to assess which applicant has superior financial and technical capabilities, and use such superiority as a differentiating factor in determining which historically disadvantaged individual (or non-historically disadvantaged individual) should be granted the relevant right.

Apart from the other provisions contained in the MPRDA, the objects of the Act itself may play a vital role in differentiating among various similar applicants in terms of section 9(2). In this regard the Minister must consider the likelihood of each applicant being able to fulfil the relevant objects. These objects have chiefly to do with transformation and contributing to economic growth, but other objects such as the empowerment of women and children and the promotion of sustainable development, are additional concerns for the Minister to consider.

Lastly, in making his decision in terms of section 9 of the Act, the Minister must also consider the provisions of the Mining Charter, which aims to promote sustainable growth and meaningful transformation of the mining industry and sets certain goals towards achieving these aims. It is submitted that a particular applicant's possible past observance and promotion of these goals might serve to guide the Minister in selecting the most suitable applicant. In conclusion it is submitted that, even though a possible solution might have been identified in order to combat the excessively broad discretion provided in section 9, legislative amendments are needed in order to ensure that all administrative action and more specifically all discretionary powers exercised within the bounds of the MPRDA, is taken within the MPRDA comply with the Constitutional requirements of reasonableness, lawfulness and procedural fairness.

The onus is on the official exercising the discretion to ensure that his powers are being exercised lawfully, reasonably and in a procedurally fair manner. However, it must be noted that it can be extremely difficult for any official to assess whether the action taken by him is duly authorised (lawful), or whether any other reasonable administrator would have reached the same conclusion as the administrator himself (reasonable), in the event that the official cannot rely on objective statutory considerations in exercising his discretion. It is thus contended that the MPRDA is in need of amendment to address

the absence of statutory guidance in the provisions affording discretionary powers to officials. Once such amendments have been drafted and implemented, the uncertainty regarding the efficacy of the Act may have been allayed.

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LIST OF ABBREVIATIONS

| | |
|----------------------|--|
| GDP | Gross domestic product |
| MPRDA | Mineral and Petroleum Resources Development Act 28 of 2002 |
| Constitution | Constitution of the Republic of South Africa, 1996 |
| PAJA | Promotion of Administrative Justice Act |
| FIFA-system | First in, first assessed system |
| MPRDA Amendment Bill | Mineral and Petroleum Resources Amendment Bill 15B of 2013 |
| SAJHR | South African Journal on Human Rights |
| CC | Constitutional Court |
| Par | Paragraph |
| RSA | Republic of South Africa |
| SCA | Supreme Court of Appeal |
| PER | Potchefstroom Electronic Law Journal |
| TSAR | Journal of South African Law |
| Et al | And others |
| NEMA | National Environmental Management Act 107 of 1998 |
| Mining Charter | Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry GN 838 in GG 33573 |
| DMR | Department of Mineral Resources |